

***United States Court of Appeals
for the Second Circuit***

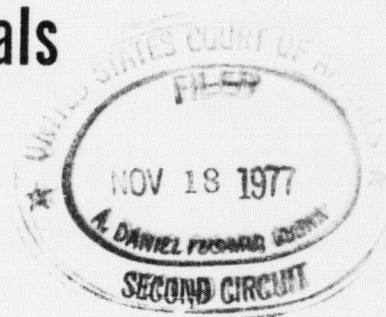


APPENDIX

No. 77-6172

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

—
No. 77-6172
—



AMERICAN CYLINDER MANUFACTURERS COMMITTEE, *Plaintiff-Appellant*,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of
Transportation, JOHN J. FEARNSIDES, as Acting Director,
Materials Transportation Bureau, ALAN I. ROBERTS, as Acting
Director, Office of Hazardous Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD., *Defendants-Appellees*.

—
JOINT APPENDIX
—

PAGINATION AS IN ORIGINAL COPY

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CAUSE																																	
28 USC, Sec. 1337 failure to comply with 5 USC Sec. 558(c) with respect to issuance of licenses. hmc																																	
ATTORNEYS																																	
LORD, DAY & LORD 25 Bway NY, NY 10004 Tel: (212) 344-8480										RICHARD N. PAPPER 791- 1974 (DOT, Adams, Fearnside & Roberts)																							
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77 Civ. 4358

AMERICAN CYLINDER MANUFACTURERS COMMITTEE VS. DEPT OF TRANSPORTATION ET AL 77-4

DATE	NR	PROCEEDINGS
✓ 09-02-77	1	Filed complaint and issued summons.
✓ 9-6-77	2	Fld Order to Show Cause for a preliminary injunction and a stay ret. in rm. 1306 on Sept. 30, 1977 at 2 pm.
✓ 9-6-77	3	Fld Memorandum in support of plttf's motion for preliminary injunction.
✓ 09-02-77	4	Fld Order appointing special process servers of Hall, Nelson, Stream, Kelly, O'Grady, Nancy Kent to serve Summons & complaint upon defts. Clk.
✓ 09-26-77	5	Filed Intervenor's affidavit & notice of motion to intervene and to dismiss or stay ret. 9/30/77, 2:00 P.M.
✓ 09-26-77	6	Filed Memorandum of U.S. Cylinders, Inc. and U.S. High Pressure Cylinders, Inc. in sup. of motion to dismiss or in alternative stay action.
✓ 09-27-77	7	Filed Defts. Dept. of Transportation, Adams, Fearnside & Roberts notice of motion for an order dismissing complaint ret. 9/30/77, Rm. 1306.
✓ 09-27-77	8	Filed Memorandum of Law of defts in opposition to motion for preliminary injunction and in support of motion to dismiss.
✓ 09-27-77	9	Filed Affidvts in opposition to motion for preliminary injunction.
✓ 09-30-77		Hearing begun on motion for preliminary injunction before Pollack, J.
		Hearing adjourned to 10/10/77, 10:30 A.M.
✓ 10-05-77	10	Filed Plttf's Amended Answer.
✓ 10-07-77	11	Filed Suppl. Memo of Law in support of defts' motion to dismiss and in opposition to plttf's motion for preliminary injunction.
✓ 10-07-77	12	Filed Plttf's reply Memorandum.
✓ 10-07-77	13	Filed Addendum to Memorandum in support of plttf's motion for preliminary injunction.
✓ 10-07-77	14	Filed Suppl. Memo of Law in support of defts' motion to dismiss and in opposition to plttf's motion for preliminary injunction.
✓ 10-07-77	15	Filed transcript of record of proceedings, dated 10/10/77
✓ 10-07-77	16	Filed Plttf's reply to Dot's suppl. memorandum.
✓ 10-10-77	17	Hearing concluded. Court dictates its Findings of Fact & Conclusions of Law as required by Rule 52(2) FRCP into the record. Complaint dismissed in accordance with decision of Oct. 10, 77.
✓ 10-7-77	17	Filed plttf's Amended Complaint.
✓ 10-11-77		Filed Memo End. on Document #2. Application for preliminary injunction is consolidated with trial on merits which is to be held on 10/10/77 at 10:30 A.M. in Rm. 1306. So Ordered. Pollack, J. m/n
✓ 10-11-77		Filed Memo End. on document #5. Motion to intervene is denied. However the applicant may participate herein as Amicus Curiae and submit a brief if so advised. So Ordered. Pollack, J.
✓ 10-11-77		Filed Memo End. on document #7. complaint dismissed in accordance with, decision of 10/10/77. So Ordered. Pollack, J. m/n (dtd 10/10/77.)
✓ 10-17-77	18	Filed plttf's Notice of Appeal to USA, 2nd Circuit from each & every part of order dismissing complaint entered on 10/11/77. (mailed notice to AUSA Richard N. Papper and reboul MacMurray Hewitt Maynard & Kristol on 10/18/77)
✓ 10-17-77	19	Filed Undertaking for costs on appeal in sum of \$250. (National Surety Corporation)

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

-against-

DEPARTMENT OF TRANSPORTATION,
BROCK ADAMS, as Secretary of
Transportation,
JOHN J. FEARNSIDES, as Acting Director
of the Materials Transportation
Bureau,
ALAN I. ROBERTS, as Acting Director
of the Office of Hazardous Materials
Operations, and
ENGINEERING PRODUCTS OF CANADA,
LTD.,

Defendants.

77 Civ.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

The Parties

1. Plaintiff, the American Cylinder Manufacturers Committee ("ACMC"), 1055 Thomas Jefferson Street, N.W., Washington, D.C., 20007, is an unincorporated association of domestic cylinder manufacturers whose members produce approximately 90 percent of all domestically manufactured compressed gas cylinders.
2. The Department of Transportation ("the Department" or "DOT"), 400 7th Street, S.W., Washington, D.C., 20590, is an executive department organized pursuant to the Department of Transportation Act, 49 U.S.C. §1652(a).
3. Brock Adams is the Secretary of Transportation and charged with the responsibility of promulgating regulations for the safe transportation of hazardous materials under §105 of the Hazardous Materials Transportation Act, 49 U.S.C. §1804.

4. Defendant John J. Fearnside is Acting Director of the Materials Transportation Bureau ("MTB"), 2100 Second Street, S.W., Washington, D.C., 20590, to which the Secretary of Transportation has delegated authority to promulgate such regulations. 49 C.F.R. §1.53.

5. Defendant Alan L. Roberts is Acting Director, Office of Hazardous Materials Operations ("OHMO"), 2100 Second Street, S.W., Washington, D.C., 20590. This office has been given the responsibility to consider applications filed by foreign compressed gas cylinder manufacturers and independent inspection agencies pursuant to 49 C.F.R. §173.300 a and b.

6. Engineering Products of Canada, Ltd., 150 Industrial Boulevard, Boucherville, Quebec, Canada, was issued a license by defendant Roberts pursuant to 49 C.F.R. §173.300 b to have its compressed gas cylinders chemically analyzed and tested outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials within the United States. Engineering Products of Canada, Ltd.'s, agent for service of process is James A. Newmann, Jack Newmann & Sons, P.O. Box 145, Coshen, New York.

Jurisdiction and Venue

7. This court has jurisdiction over this action under 28 U.S.C. §1337.

8. Venue lies properly in this court under 28 U.S.C. §1391(e)(1) because defendant Engineering Products of Canada, Ltd.'s, agent for service of process resides in the Southern District of New York.

MATTERS ALLEGED WITH RESPECT
TO ALL COUNTS

9. By regulations published on May 4, 1976, in the Federal Register, 41 Fed. Reg. 18412, DOT permitted, for the first time, foreign manufactured

compressed gas cylinders transported in this country to be chemically analyzed and tested outside the United States.

10. The May 4, 1976 regulations provide that inspections and verifications required by DOT Shipping Container Specifications, 49 C.F.R. Part 178, must be performed by an independent inspection agency approved by OHMO for low pressure cylinders manufactured outside the United States and for all high pressure cylinders. Such approval is provided for in 49 C.F.R. §173.300 a.

11. The May 4, 1976 regulations provide that foreign compressed gas cylinder manufacturers may avoid the domestic testing requirement by obtaining OHMO approval to have their cylinders analyzed and tested outside the United States for the purpose of qualifying such cylinders for use in the transportation of hazardous materials within the United States. Such approval is provided for in 49 C.F.R. §173.300 b.

12. In considering applications filed pursuant to 49 C.F.R. §173.300 a and b OHMO did not (1) give notice of such applications in the Federal Register, (2) permit interested persons to comment on the pending applications, or (3) explain the basis for approving such applications.

13. On August 31, 1977, OHMO issued an approval pursuant to 49 C.F.R. §173.300 b to Engineering Products of Canada, Ltd.

Count I

14. An approval issued by OHMO pursuant to 49 C.F.R. §173.300 a or b is a "License" within the meaning of §551(8) of the Administrative Procedure Act, which provides:

(8) 'License' includes the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

15. Section 558 of the Administrative Procedure Act, 5 U.S.C.

§558, provides, in pertinent part, as follows:

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

16. The procedures used by OHMO in approving the application submitted by defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300 b did not comply with §558 of the Administrative Procedure Act in that OHMO did not (1) give notice of the application in the Federal Register; (2) allow interested persons to comment on the application or present evidence with respect to it; and (3) explain its findings and conclusions in approving the application.

Count II

17. The procedures used by OHMO in granting a license to defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300 b did not allow for any participation whatever by interested persons.

18. Beginning in July, 1976, ACMC requested, both verbally and by letters, that OHMO provide for participation by interested persons in the licensing process.

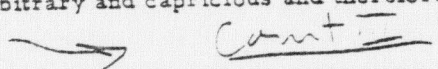
19. ACMC's request has never been answered by OHMO and it was effectively denied when the first license was issued on August 31, 1977, to Engineering Products of Canada, Ltd.

20. The record of the rulemaking proceeding reveals that major questions exist with regard to the ability of at least some manufacturers and

inspection agencies properly to interpret and to apply applicable regulations.

21. Participation by interested persons in the licensing process would help assure that such questions are thoroughly examined before individual licenses are granted.

22. In light of the serious questions raised in the rulemaking record and the significant benefits of participation by interested persons, the licensing procedures used by OHMO in granting an approval to defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300 b were arbitrary and capricious and therefore unlawful and invalid.

 WHEREFORE, ACMC requests that:

23. The Court declare that the approval issued to defendant Engineering Products of Canada, Ltd. pursuant to 49 C.F.R. §173.300 a and b is null and void;

24. This Court declare that all the approvals which have been issued by the defendants DOT, Adams, Fearnside, or Roberts pursuant to 49 C.F.R. §173.300 a or b are null and void;

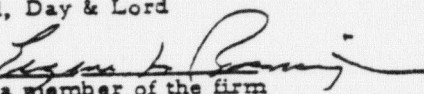
25. Defendants DOT, Adams, Fearnside, and Roberts and their official successors be enjoined from processing or issuing any further approvals pursuant to 49 C.F.R. §173.300 a and b except under procedures conforming to the requirements of 5 U.S.C. §§556 and 557;

26. Such other further relief as the Court finds is just and necessary.

Respectfully submitted,

Lord, Day & Lord

by:


a member of the firm

25 Broadway
New York, New York 10004

William W. Scott
Richard E. Schwartz
Michael D. Sherman
Collier, Shannon, Rill, Edwards
& Scott
1055 Thomas Jefferson Street, N.W.
Washington, D.D. 20007

Pro Hac Vice

September 2, 1977

RULES AND REGULATIONS

pose since the amendments are editorial in nature.

1. In § 3.551, paragraph (c) is revised and paragraph (g) is revoked so that the revised material reads as follows:

§ 3.551 Reduction because of hospitalization.

(c) *Reduction after 2 months.* Where pension is being paid to a veteran under 38 U.S.C. 521(b) or to a Spanish-American War veteran who was not receiving pension for June 30, 1960, or who is receiving pension under 38 U.S.C. 521, the pension for a veteran who has neither wife, husband, nor child, or who, though married, is receiving pension as prescribed by 38 U.S.C. 521(b) because not living with or reasonably contributing to the support of his or her spouse shall continue at the full monthly rate until the end of the second calendar month (except as provided in paragraph (d) of this section) following the month of admission for hospitalization. The rate payable effective the first of the third calendar month will be an amount not in excess of \$50 monthly. Where the veteran has been discharged from a period of hospitalization of not less than 2 full calendar months and is readmitted within 6 months, the award will be reduced effective the date of readmission. (Pub. L. 93-177; 87 Stat. 694)

(1) Where pension was being paid to a married veteran at the rate prescribed by 38 U.S.C. 521(b), all or any part of the rates payable under 38 U.S.C. 521(c), (d) or (e) may be apportioned for an estranged wife or husband as provided in § 3.454(b). (38 U.S.C. 3203(a))

(2) Where pension is payable to a Spanish-American War veteran who is in need of aid and attendance, pension under 38 U.S.C. 512 may be continued under the provisions of paragraph (b) of this section if the veteran was receiving or entitled to receive pension for June 30, 1960. See § 3.711.

(g) (Revoked)

2. In § 3.558, the title and paragraph (c)(1) are revised to read as follows:

§ 3.558 Resumption and payment of withheld benefits: incompetent \$1,500 estate cases.

(c) Any amount not paid because of the provisions of § 3.557 will be awarded:

(1) To a veteran who is currently rated competent by the Veterans Administration or as to whom a legal disability has been removed, after release from hospitalization and after the expiration of 6 months following the effective date of the rating of competency by the Veterans Administration or removal of the legal disability, whichever is the later. Included for payment under this provision are amounts of compensation or retirement pay withheld pursuant to the provisions of § 3.551(b) (and/or predecessor regulatory provisions) as it was constituted prior to August 1, 1972, and

not previously paid because of the provisions of § 3.557(b). (38 U.S.C. 3203 Note)

Effective date. These VA Regulations are effective April 27, 1976.

Approved: April 27, 1976.

By direction of the Administrator.

(SEAL) ODELL W. VAUGHN,
Deputy Administrator.

(FR Doc. 76-12897 Filed 5-3-76; 8:45 am)

TITLE 49—Transportation CHAPTER I—MATERIALS TRANSPORTATION BUREAU, DEPARTMENT OF TRANSPORTATION

(Docket No. HM-74; Amdt. Nos. 173-97;
178-99)

PART 173—SHIPPERS

PART 178—SHIPPING CONTAINER SPECIFICATIONS

Inspection and Testing Requirements for
Cylinders Manufactured Outside the
United States

This docket was opened on January 19, 1971, when the Hazardous Materials Regulations Board announced that it was considering the necessity for continuing the domestic analysis and test rule (38 FR 833) and that a public hearing had been scheduled for that purpose. The domestic analysis and test rule, found in the compressed gas cylinder specifications of Part 178, requires that an analysis of metal to be used in making a cylinder, as well as tests on the finished or partially finished product, be conducted within the United States, regardless of where that cylinder is manufactured. On June 10, 1971, following a two-day public hearing, the Board announced, based on information then available, that it had concluded that analyses and tests could be performed outside the United States under appropriately controlled manufacturing procedures. The Board at the same time also proposed amendments it believed would establish that control (38 FR 11224).

The 1971 proposals would have—
1. Required all disinterested inspectors to be approved by DOT rather than by the Bureau of Explosives of the American Association of Railroads, as is the current practice;

2. Required disinterested inspection of all foreign-made cylinders, while continuing to allow interested inspection of domestic-made low pressure cylinders (inspection by an employee of the cylinder manufacturer); and

3. Allowed, for the first time, analyses and tests to be made outside the United States, but only upon DOT manufacturing approval, and only in conjunction with DOT-approved disinterested inspection.

The docket remained open for public comment until November 1971. It was reopened February 3, 1972, to consider what additional changes to the cylinder specifications of Part 178, if any, might be

necessary to the transportation safety of compressed gas cylinders. The February 1972 notice also sought comment on what specific qualifications and requirements cylinder inspectors should be required to meet before being approved by DOT. The docket remained open for comment until October 3, 1972.

On January 13, 1976 (41 FR 1213), after thorough consideration of the contents of the docket, a revised notice of proposed rulemaking was published, which essentially repeated the 1971 proposals. In addition, the revised notice also proposed—

1. A substitution of the term "independent inspection agency" for "disinterested inspector";

2. A specific process by which a person could apply for approval as an independent inspection agency, a similar process by which a manufacturer could apply for approval to conduct analyses and tests outside the United States, and the information necessary to support such applications (including designation of an agent for service of process for nonresident applicants);

3. The discontinuance of authority for domestic manufacturers of low pressure cylinders to use interested inspectors in favor of independent inspectors (a proposal which has since been severed from this docket and is presently being considered under Docket HM-74A, 41 FR 11179, March 17, 1976).

Well over 300 comments have been received on this rulemaking since it was first opened, about 30 of which have been received since publication of the revised notice early this year. Interest has been expressed by domestic cylinder users, domestic steel suppliers, and both foreign and domestic cylinder manufacturers, trade associations and inspection agencies. References herein are to comments received on the January 1976 revised notice. Those comments, however, are generally representative of comments on earlier docket publications.

THE DOMESTIC ANALYSIS AND TEST RULE

The domestic analysis and test rule dates to 1922 and was originally intended to protect American citizens against gas cylinders of uncertain pedigree. At a time preceding rapid transoceanic travel and communication, the necessity for the rule was clear.

The nature of that necessity has gradually altered. A substantial exchange of complex industrial and scientific information now occurs among Europe, the United States and elsewhere, and it is presently possible for the Department to perform an inspection at a foreign location almost as quickly as at a domestic location. The MTB believes it is practical to establish a properly supervised alternate method involving analysis and testing outside the United States, by which a foreign cylinder manufacturer can comply with the Department's gas cylinder regulations.

It was apparent early in this docket that some domestic users of compressed gas cylinders, as well as some foreign

RULES AND REGULATIONS

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manufacturers, consider themselves unnecessarily burdened by the domestic analysis and test rule. To enter the American cylinder market, a foreign manufacturer must not only adjust his usual testing and manufacturing cycle to meet DOT requirements, he must also face additional costs and manufacturing delays resulting from the domestic analysis and test rule.

Some domestic cylinder users believe that price and supply in the domestic cylinder market reflect a lack of competition and attribute that condition to the barrier, perceiving in it a non-tariff trade barrier that effectively prevents the entry of quality foreign-made cylinders. A representative of the Department of Justice Antitrust Division, in the March 19, 1971 public hearing which is part of this docket, observed similarities between trade restraints intended to be remedied by an antitrust suit filed against the American Society of Mechanical Engineers and the claimed trade barrier effects of the domestic analysis and test rule. In a separate action as late as last year, the Justice Department obtained a consent decree effectively reversing the acquisition of Pressed Steel Tank Company by Norris Industries, the second and fourth largest producers of high pressure cylinders in the United States.

In light of a docket which extends back to 1971, the MTB has concluded that domestic analysis and testing are not any more conducive to safety than properly supervised analysis and testing occurring elsewhere. Moreover, the MTB recognizes the obvious difficulties that the domestic analysis and test rule imposes on foreign cylinder manufacturers and the possibility that those difficulties may be reflected in the domestic cylinder market. Continuance of the Department's reliance on the domestic analysis and test rule as the exclusive means by which foreign-made cylinders can be manufactured in compliance with safety regulations may be tantamount to regulating transportation safety by effectively prohibiting importation of most foreign-made cylinders without regard to quality. The domestic analysis and test rule was never intended to prohibit the importation of foreign-made compressed gas cylinders but to insure that those imported are safe. The amendments are intended to provide a more reliable and economically less burdensome means of distinguishing between good and bad cylinders.

In defense of retaining the domestic analysis and test rule, the American Cylinder Manufacturers Committee (ACMC), commenting on other materials found in the docket, states that—

[T]estimony . . . which seeks to establish that the current safety regulations are a non-tariff trade barrier or provide the domestic cylinder manufacturers with a monopoly in the domestic cylinder market or limit the supply of cylinders available in this country is irrelevant to this proceeding and invalid . . . [T]he only information which OEMAO may consider in its evaluation of the issues raised by EMT-74 is information relevant to the safety of compressed gas cylinders introduced into interstate commerce.

The ACMC is generally correct. The statutory responsibility of the Department is transportation safety. On that basis, the new amendments are an improvement over the existing regulations. The amendments are expected to increase the control and supervision exercised by DOT over foreign manufacturers, as well as over many domestic manufacturers. The amendments accomplish this by requiring all independent cylinder inspectors to be approved by DOT, by requiring that all foreign-made cylinders and domestic-made high pressure cylinders be subjected to independent inspection, and by requiring DOT manufacturing approval in any case where analyses and tests are to be performed outside the United States.

An additional consideration is the fact that retention of the domestic analysis and test rule, absent some justification in transportation safety, wrongly places the Department in the position of preemptively regulating an aspect of national economic policy and foreign trade which is properly addressed by Congress and other Federal agencies. In short, although the new amendments promise greater transportation safety, even if they did not, there would still remain a legitimate question of whether the existing regulations achieve safety in an efficient manner.

CONDITIONS OF FOREIGN CYLINDER MANUFACTURE

Many of the comments addressed to foreign manufacturers as a group, asserting that foreign manufacturers have in the past fallen short of meeting DOT specifications, do not now manufacture to DOT specifications, lack adequate testing and inspection procedures and have poor quality control. The conclusion apparently urged is that until all identifiable foreign manufacturers have been evaluated as part of that group, there is not any single manufacturer who can be said to be competent to manufacture gas cylinders to DOT specifications.

An attempt to exhaustively evaluate all foreign manufacturers before approving any one of them would be wasteful and would produce results of questionable value. Comments from both foreign and domestic interests recognize that foreign cylinder manufacturers constitute a diverse group which unquestionably includes a great many concerns that will never seek entry into the U.S. cylinder market, as well as concerns that will not or cannot comply with DOT regulatory standards. The amendments are therefore structured to provide an individual evaluation of each foreign inspection agency and foreign manufacturer who seeks DOT approval.

Several other comments expressed the view that foreign cylinder manufacturers will have an unfair price advantage because of the availability of cheap labor, or because ineffective regulatory supervision will allow production of defective and thus less expensive cylinders than the quality product of a domestic manufacturer. Cheap labor, to the ex-

tent it does exist in countries sufficiently advanced technologically to manufacture cylinders, may indeed result in low manufacturing costs. Foreign producers, however, are also subject to a 3% or 7½% tariff, additional transportation costs, and DOT inspection costs that are not faced by their domestic counterparts. There exist outside the DOT appropriate means of dealing with unfair import competition.

With regard to the possibility of lax regulatory enforcement, it is the intent of the Department that regulatory compliance by foreign manufacturers will be as complete as compliance by domestic manufacturers.

REGULATION OF FOREIGN MANUFACTURERS AND INSPECTORS

A number of comments expressed the view that regulating foreign cylinder manufacturers and inspectors is difficult, expensive and beyond the capacity of DOT. One comment suggested that unannounced inspection of foreign manufacturers would be "impractical, if not impossible". DOT inspection of foreign facilities may in some cases be more difficult than inspection of domestic facilities, but it is practical and will be used in essentially the same fashion as it is used domestically. The amendments require the cost of foreign inspection by the Office of Hazardous Materials Operations to be borne by the manufacturer or inspection agency seeking DOT approval as a condition of that approval. The intention is to recover "out-of-pocket" costs to the United States Government for foreign inspections considered necessary to evaluate an approval application, or necessary to monitor an approval holder, but not to recover salary for OEMO personnel.

Another series of comments suggested that the regulations governing cylinder manufacture are so vague that only the domestic industry, with its record of safety, common regulatory experience and common language can be relied upon for comprehension and compliance. It is clear that some foreign manufacturers are capable of making cylinders to DOT specifications and that the regulatory provisions governing cylinder manufacture are capable of communication outside the United States. Differences between domestic and foreign manufacturers can be evaluated in the course of considering approval applications and monitoring approval holders.

Finally, a number of commenters addressed problems foreseen in making civil or criminal penalties effective against a foreign cylinder manufacturer or inspection agency, or collecting from him a tort judgment. A nonresident manufacturer who chooses to conduct analyses and tests outside the United States, or a nonresident inspection agency, must designate a domestic agent for service of process before DOT approval will be granted. Service on that agent will be sufficient for purposes of civil or criminal action under the Hazardous Materials Transportation Act of 1974 (Pub. L. 93-633, 49 U.S.C. 1801 et seq.) when the

necessary implementation of the Act's relevant provisions is completed (see *Docket No. 113*, 41 FR 3188, March 1, 1976). Actual enforcement of any such action is in any event backed by withdrawal of Departmental approvals. In the case of a civil suit, the MTB recognizes that reaching assets located outside the United States may be more difficult than reaching domestic assets. The concern of the MTB in this matter is that some products liability exposure exist to provide additional motivation for a cylinder producer to avoid manufacturing errors. Distinctions between national jurisdictions as to proof of liability or manner of recovery are marginal to this concern.

THE APPROVAL PROCESS

A criticism made by several commenters dealt with what is perceived as a lack of specificity in the criteria to be used in determining whether to grant approval to a foreign manufacturer or inspector. One commenter addressing the approval process in particularly useful detail was Union Carbide Corporation. Certain of the Union Carbide comments regarding clarity of the proposed rules have been incorporated into the final rules, and others are addressed here.

The term "person" used in the amendments is defined at 49 CFR 17.15995, April 15, 1976) as an individual, firm, co-partnership, corporation, partnership, association, joint stock association, or trustee, receiver, assignee or personal representative of the foregoing.

Among the items of information necessary to support an inspection agency application, new § 173.300a(b)(8) requires identification and qualifications of those inspectors responsible for certifying inspection and test results (certifying inspectors). Certifying inspectors are responsible for the proper performance of inspection duties. Certifying inspectors may witness or perform tests themselves, or supervise others in such activity. In the latter case, new section 173.300a(b)(7) requires a method by which such supervised inspectors may be individually identified. Supervised inspectors may not certify inspection or test results. They are answerable as part of the independent inspection agency, cannot be an employee of the cylinder manufacturer, and cannot delegate their functions. The certifying inspector cannot delegate his certification functions. Actual organizational arrangements must be specified in the application and must meet the circumstances of manufacture.

From applicant inspection agencies, the amendments also require identification and description of testing facilities, a description of the agency's ability to perform duties imposed by Part 178, a description of ownership interests in the agency, and for nonresident agencies, a designation of agent for service of process.

From applicant manufacturers, the amendments require identification and description of each facility at which cylinders are to be manufactured or

where analyses and tests will occur. Complete details on each specification cylinder for which manufacturing approval is sought must be provided, and the independent inspection agency to be used must be identified. Nonresident manufacturers must designate an agent for service of process.

The MTB believes that the level of specificity in the new amendments is sufficient to give notice as to how the approval process is expected to operate. A great number of factors, such as experience, credentials, training, available equipment and other resources, as well as (for inspection agencies) independence, are involved in each approval decision. To attempt to enumerate each factor and identify a constant relationship it may bear to any final approval action would suggest absolutes that do not exist and might tend to rule out concerns that may prove to be important. It is the intent of the amendments that the Director retain substantial discretion in approval decisions. Additional information may be sought for any approval application or in the course of monitoring an approval holders activities.

The effect of an approval issued to an independent inspection agency or a manufacturer is limited by consideration of any terms or conditions considered necessary by the Director, OEHM, and specified therein.

An approval issued either a manufacturer or an inspection agency may be terminated, for fraud, noncompliance with Subchapter C, nonsatisfaction of Federal civil or criminal enforcement action, or if continuation of the approval is not consistent with the requirements of transportation safety. The latter category could encompass nonsatisfaction of a final judgment involving a tort claim related to cylinder manufacturing or inspection deficiencies; other circumstances indicating the practical non-existence of an approval holders' exposure to product safety tort liability; or, a loss of independence by an approved inspection agency.

Prior to approval termination, the approval holder will be notified of the basis for that action and given an opportunity to show why the approval should not be terminated.

Provision has been made for any domestic inspection agency, which the Bureau of Explosives has designated as a competent and disinterested inspector prior to May 1, 1976, upon timely application and presentation of credentials, to be approved as a domestic independent inspection agency. Such agencies will be limited by the terms of such an approval to activities within the United States, for which reason they may choose to submit a full application for DOT approval subsequent to or instead of presentation of Bureau of Explosives credentials. Submission of Bureau of Explosives credentials must be made by July 13, 1976. Until August 15, 1976, Bureau of Explosives designation is acceptable as DOT approval. Following that date, such designation will not be recognized for any purpose.

In consideration of the foregoing, 49 CFR, Parts 173 and 178 are amended as follows:

1. New §§ 173.300a, 173.300b, and 173.300c are added to read as follows:

§ 173.300a Approval of independent inspection agency.

(a) Any person who (1) does not manufacture cylinders for use in the transportation of hazardous materials and (2) is not directly or indirectly controlled by any person or firm which manufactures cylinders for use in the transportation of hazardous materials, may apply to the Department of Transportation for approval as an independent inspection agency for the purpose of performing cylinder inspections and verifications required by Part 178 of this subchapter.

(b) Each application filed under this section for approval as an independent inspection agency must:

(1) Be submitted in writing to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590;

(2) State the name, address, principal business activity, and telephone number of the applicant and the name and address of each facility where tests and inspections are to be performed;

(3) State the name, address and principal business activity of each person having any direct or indirect ownership interest in the applicant greater than three percent and of each subsidiary or division of the applicant;

(4) If the applicant is not a permanent resident of the United States, include a designation of a permanent resident of the United States as his agent for service of process in accordance with § 107.7 of this title;

(5) Set forth a detailed description of the inspection and testing facilities to be used by the applicant and the applicant's capability to perform the inspections and verify the tests required by Part 178 of this subchapter;

(6) Identify by name each individual whom the applicant proposes to employ as an inspector responsible for certifying inspection and test results and a statement of that person's qualifications; and

(7) Specify the identification or qualification number assigned to each inspector who is supervised by a certifying inspector identified in § 173.300a(b)(6).

(c) Upon the request of the Director, OEHM, the applicant shall allow the Director to inspect the applicant's inspection and testing facilities. In the case of inspection and testing facilities located outside the United States, the applicant shall bear the cost of the inspection.

(d) If, on the basis of information submitted in the application and his own investigation, the Director, OEHM, finds that the applicant is qualified to perform the inspections and verifications required by Part 178 of this subchapter for cylinders to be used in the transportation of hazardous materials, he issues an approval subject to such terms and conditions as he considers necessary.

(e) The Director, OEHMO, will issue an approval as an independent inspection agency for the purpose of performing inspections and verifications within the United States to any competent and disinterested inspector of cylinders so designated by the Bureau of Explosives before May 1, 1976, who submits a copy of that designation by July 15, 1976, together with the name, the assigned identification or qualification number, and a statement of the qualifications of each person employed as an inspector under that designation to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590.

(f) Notwithstanding any requirement of this subchapter to the contrary, between May 30, 1976, and August 13, 1976, inspections and verifications required by Part 178 may be performed within the United States by any competent and disinterested inspector so designated by the Bureau of Explosives prior to May 1, 1976.

(g) An approval issued under this section is not transferable and is effective until surrendered or withdrawn or otherwise terminated by the Director, OEHMO.

(h) The holder of an approval issued under this section shall notify the Director, OEHMO, within 20 days after the date there is any change in the information submitted in the application for the approval.

(i) Upon the request of the Director, OEHMO, the holder of an approval issued under this section shall allow the Director to inspect the holder's inspection and testing facilities and shall make available for inspection the holder's records pertaining to inspections and verifications required by Part 178 of this subchapter. In the case of inspection and testing facilities located outside the United States and records made available for inspection outside the United States, the holder shall bear the costs of inspection.

§ 173.300b Approval of non-domestic chemical analyses and tests.

(a) Any person who manufactures cylinders outside the United States may apply to the Department for approval to have the chemical analyses and tests of those cylinders required by Part 178 performed outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials for from or within the United States.

(b) Each application filed under this section for approval to perform chemical analyses and tests of cylinders outside the United States must:

(1) Be submitted in writing to: Office of Hazardous Materials Operations, U.S. Department of Transportation, Washington, D.C. 20590;

(2) State the name, address, and telephone number of the applicant and the name, address and a description of each facility at which cylinders are to be manufactured and chemical analyses and tests are to be performed;

(3) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as his agent for service of

process in accordance with § 107.7 of this title:

(4) Set forth complete details concerning the dimension, materials of construction, wall thickness, water capacity, shape, type of joints, location and size of openings and other pertinent physical characteristics of each specification cylinder for which approval is being requested, including calculations for cylinder wall stress and wall thickness which may be shown on a drawing or on separate sheets attached to a descriptive drawing. If units of weights and measures are expressed in the metric system, they must also be stated in the English system equivalents; and

(5) Identify the independent inspection agency to be used.

(c) Upon the request of the Director, OEHMO, the applicant shall allow the Director to inspect the applicant's cylinder manufacturing and testing facilities and shall provide such materials and cylinders for analyses and tests as the Director may specify. The applicant shall bear the cost of the inspections, analyses, and tests.

(d) If, on the basis of the information submitted in the application and his own investigation, the Director, OEHMO, finds that the applicant has the proper manufacturing equipment and facilities and is otherwise capable of insuring the proper performance of the chemical analyses and tests required by Part 178 of this subchapter for cylinders to be used in the transportation of hazardous materials, the issues and approval, subject to such terms and conditions as he considers necessary.

(e) An approval issued under this section is not transferable and is effective until surrendered or withdrawn or otherwise terminated by the Director, OEHMO.

(f) The holder of an approval issued under this section shall notify the Director, OEHMO, within 20 days after the date there is any change in the information submitted in the application for the approval.

(g) Upon the request of the Director, OEHMO, the holder of an approval issued under this section shall allow the Director to inspect the holder's cylinder manufacturing and testing facilities, any cylinder manufactured under that approval, the holder's inspection and test records, and technical data files pertaining to any cylinder manufactured under that approval. In the case of facilities located outside the United States, or cylinders, records or files made available for inspection outside the United States, the holder shall bear the costs of inspection.

§ 173.300c Termination of approval.

(a) The Director, OEHMO, may terminate an approval issued under § 173.300a or § 173.300b of this subpart if he determines—

(1) That information upon which approval was based is fraudulent or substantially erroneous;

(2) That the holder has not complied with Subchapter C of this chapter.

(3) That, in the case of an independent inspection agency, the agency or an employee thereof is or appears to be controlled or improperly influenced by cylinder manufacturing interests;

(4) That the holder is subject to an outstanding final judgment of a Federal court which concerns the enforcement of Subchapter C and which has not been satisfied within a reasonable period of time; or

(5) That continuation of the approval is not consistent with the requirements of transportation safety.

(b) The Director, OEHMO, before he terminates an approval issued under § 173.300a or § 173.300b of this subpart, notifies the holder in writing of the reasons therefor and provides the holder an opportunity to show why the approval should not be terminated.

2. In section 173.301, paragraph (f) and the introductory text of paragraph (j) are revised to read as follows:

§ 173.301 General requirements for shipment of compressed gases in cylinders.

(i) *Foreign cylinders in domestic use.* A charged cylinder manufactured outside the United States may not be offered for transportation to, from, or within the United States unless it has been manufactured, inspected, and tested in accordance with the applicable DOT specification set forth in Part 178 of this subchapter.

(j) *Charging of foreign cylinders for export.* Unless it has been manufactured, inspected, and tested in accordance with the applicable DOT specification set forth in Part 178 of this subchapter, a cylinder manufactured outside the United States and received in the United States for charging with compressed gas may be charged and shipped for export only.

3. Sections 178.36-3, 178.37-3, 178.41-3, 178.43-3, 178.44-3, 178.45-3, 178.47-3, 178.48-3, 178.49-3, 178.54-3, and 178.58-3 are revised to read as follows:

§ 178. Inspection by whom and where.

Inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OEHMO, in accordance with § 173.300a of this subchapter. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OEHMO, in accordance with § 173.300b of this subchapter.

4. Sections 178.38-3, 178.39-3, 178.40-3, 178.42-3, 178.50-3, 178.51-3, 178.52-3, 178.53-3, 178.55-3, 178.56-3, 178.57-3, 178.61-3, and 178.68-3 are revised to read as follows:

§ 178. Inspection by whom and where.

Inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OEHMO, in accordance with § 173.300a or, in the case of cylinders manu-

factured in the United States, a competent inspector of the manufacturer. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OEDMO, in accordance with § 173.300b of this subchapter.

5. In § 178.59-3 and 178.60-3, paragraph (a) is revised to read as follows: § 178.59-3 (Amended)

(a) Inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OEDMO, in accordance with § 173.300a or, in the case of cylinders manufactured in the United States, a competent inspector of the manufacturer. Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OEDMO, in accordance with § 173.300b of this subchapter.

6. Section 178.65-3 is revised to read as follows:

§ 178.65-3 Inspection by whom and where.

(a) In the case of cylinders having marked service pressures higher than 300 psig, inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OEDMO, in accordance with § 173.300a of this subchapter.

(b) In the case of cylinders having marked service pressures of 300 psig or lower, inspections and verifications must be performed by an independent inspection agency approved in writing by the Director, OEDMO, in accordance with § 173.300b of this subchapter or, in the case of cylinders manufactured in the United States, by a competent inspector of the manufacturer.

(c) Chemical analyses and tests as specified must be made within the United States unless otherwise approved in writing by the Director, OEDMO, in accordance with § 173.300b of this subchapter.

(18 U.S.C. 234, 46 U.S.C. 170 (7), 49 U.S.C. 1672 (b) (1), 49 CFR 1.83 (f) - (h).)

Effective date: These amendments take effect May 30, 1976.

Issued in Washington, D.C. on April 28, 1976.

JAMES T. CURTIS, Jr.,

Director,

Materials Transportation Bureau.

[FR Doc. 76-12870 Filed 5-3-76; 8:45 am]

Title 50—Wildlife and Fisheries
CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

PART 33—SPORT FISHING

Iroquois National Wildlife Refuge,
New York

The following special regulations are issued and are effective during the period May 1, 1976 through December 31, 1976.

§ 33.5 Special regulation: sport fishing; for individual wildlife refuge areas.

NEW YORK

IROQUOIS NATIONAL WILDLIFE REFUGE

Sport fishing on the Iroquois National Wildlife Refuge, Basom, New York, is permitted on all waters designated by signs as open in accordance with specified dates. Sport fishing shall be in accordance with all applicable State regulations subject to the following special conditions:

(1) All waters will be closed to fishing from April 1 through July 15 and October 1 through November 30 except those portions of the Feeder Canal and Oak Orchard Creek designated by signs as open.

(2) Boats without motors may be used on Oak Orchard Creek from the Knowlsville Road to a wire two miles westward.

(3) Firearms are not permitted in boats.

(4) Leaving boats, structures, or other equipment overnight on the refuge is not permitted.

All fishing areas are delineated on maps available at Refuge Headquarters, RFD #1, Casey Road, Basom, New York 14013 or from the Regional Director, U.S. Fish and Wildlife Service, Post Office and Courthouse Building, Boston, Massachusetts 02109.

The provisions of this special regulation supplement the regulations which govern fishing on wildlife refuge areas generally, which are set forth in Title 50, Code of Federal Regulations, Part 33, and are effective through December 31, 1976.

WILLIAM C. ASKE,

Acting Regional Director,
U.S. Fish and Wildlife Service.

APRIL 27, 1976.

[FR Doc. 76-12837 Filed 5-3-76; 8:45 am]

PART 33—SPORT FISHING

Tinicum National Environmental Center,
Pennsylvania

The following special regulations are issued and are effective during the period April 30, 1976 through December 31, 1976.

§ 33.5 Special Regulations: sport fishing; for individual wildlife refuge areas.

PENNSYLVANIA

TINICUM NATIONAL ENVIRONMENTAL CENTER

Sport fishing on the Tinicum National Environmental Center, is permitted only on those areas designated by signs as open to fishing. These open areas, comprising approximately 145 acres, are delineated on a map available at Center Headquarters, Suite 104, Scott Plaza 2, Philadelphia, Pennsylvania 19113, or from the Regional Director, U.S. Fish and Wildlife Service, Post Office and Courthouse Building, Boston, Massachusetts 02109. Sport fishing shall be in accordance with all applicable State regu-

lations except for the following special conditions:

(1) Season: April 30-December 31—daylight hours only.

(2) Boats prohibited.

(3) No set tackle may be used.

The provisions of this special regulation supplement the regulations which govern sport fishing on wildlife refuge areas generally, which are set forth in Title 50, Code of Federal Regulations, Part 33, and are effective through December 31, 1976.

WILLIAM C. ASKE,

Acting Regional Director,
U.S. Fish and Wildlife Service.

APRIL 27, 1976.

[FR Doc. 76-12838 Filed 5-3-76; 8:45 am]

True 47—Telecommunications

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

(Docket No. 19525; FCC 76-377)

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)

In the Matter of Proposals for new or revised classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS).

MEMORANDUM OPINION AND ORDER RE PETITIONS FOR DECLARATORY RULING

By the Commission: Commissioner Quello concurring in part and dissenting in part and issuing a statement in which Commissioner Hooks joins; Commissioner Washburn absent.

1. In a First Report and Order in this proceeding (November Order), 56 FCC 2d 593 (1975), the Commission established a registration program designed to allow users of the nationwide telephone network to connect terminal equipment other than PBXs, key telephone equipment, main telephones and coin telephones to the network without the need for carrier-supplied protective couplers, provided that such equipment complies with standards incorporated into the registration program to protect the network against harm. This program was made applicable both to equipment provided by users (customer-supplied equipment) and to equipment provided by telephone companies (carrier-supplied equipment). On February 13, 1976, the Commission issued a Memorandum Opinion and Order (FCC 76-134) (hereafter, February Order) in reconsideration of the November Order which generally affirmed the conclusions and principles of the November Order, but which established certain "grandfather" provisions.

1 56 FCC 2d at 601.

July 28, 1976

Mr. James T. Curtis, Director
Materials Transportation Bureau
United States Department of Transportation
Trans Point Building, Room 6224
2100 Second Street, S. W.
Washington, D. C. 20590

Dear Mr. Curtis:

The American Cylinder Manufacturers Committee [ACMC] hereby requests that the Materials Transportation Bureau [MTB] establish the following procedures in ruling on: (1) A person's application filed with the Department of Transportation [DOT], pursuant to 49 C.F.R. §173.300a, for approval as an "independent inspection agency for the purpose of performing cylinder inspections and verifications required by [49 C.F.R. Part 178]"; and (2) a foreign manufacturer's application filed with DOT, pursuant to 49 C.F.R. §173.300b, for approval "to have the chemical analyses and tests of [its] cylinders required by [49 C.F.R. Part 178] performed outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials to, from or within the United States."

A. Within five days of receipt of an application submitted pursuant to 49 C.F.R. §173.300a(a) or 49 C.F.R. §173.300b(a), MTB shall give public notice of the application in the Federal Register. On the day the notice appears, MTB shall place on file for public inspection the entire application and accompanying data which have been submitted to the Office of Hazardous Materials Operations [OHM] as specified in 49 C.F.R. §173.300a(b) and 49 C.F.R. §173.300b(b).

Mr. James T. Curtis, Director
July 28, 1976
Page Two

B. Interested parties shall have thirty days from the date of the Notice in the Federal Register to support, comment on or object to the application request.

C. If objections are received by OHMO, then a hearing on the merits of the application shall be held at a date satisfactory to the parties involved. The hearing procedures shall provide for the submission by interested parties of written testimony and the oral cross-examination of such testimony.

D. The written objections and the facts adduced at the hearing shall be considered part of OHMO's "Investigation" of the application request required to be undertaken by OHMO pursuant to 49 C.F.R. §173.300a(d) and 49 C.F.R. §173.300b(d).

ACMC submits that safety considerations mandate that the procedures outlined above or similar procedures be implemented. In answers to several questions submitted to DOT Secretary Coleman by Senator Bayh of Indiana, DOT conceded that MTB's greatest effort would be spent in initially approving independent inspection agencies and foreign manufacturers and that post-approval monitoring would be less thorough. Accordingly, the approval process has greater significance than if a comprehensive monitoring procedure were envisioned by MTB.

Interested parties should be given the opportunity to challenge technical data of the type to be submitted in application approval requests by both independent inspection agencies and foreign manufacturers. Such safeguards are needed to assure that MTB makes reasoned and judicious decisions in certifying an independent inspection agency or permitting a foreign manufacturer to have its cylinders, which are destined for use in the United States, analyzed and tested abroad. The potential for harm caused by an unsafe cylinder entering the stream of U. S. commerce cannot be ignored. MTB has had no previous experience in judging either inspection agencies or foreign manufacturers of compressed gas cylinders. Therefore, it would appear incumbent upon MTB to seek and

1/Written response by Secretary Coleman to written questions received from Senator Bayh at a hearing held by Subcommittee on Transportation of the Senate Committee on Appropriations, April 9, 1976.

Mr. James T. Curtis, Director
July 29, 1976
Page Three

consider the views of interested persons with a knowledge of compressed gas cylinders in determining whether or not to approve independent inspection agencies or foreign cylinder manufacturers under 49 C.F.R. §§173.300a and 173.300b.

Respectfully submitted,

WILLIAM W. SCOTT

September 24, 1976

Mr. James T. Curtis, Director
Materials Transportation Bureau
United States Department of Transportation
Trans Point Building, Room 5224
2100 Second Street, S. W.
Washington, D. C. 20590

Re: P-548

Dear Mr. Curtis:

On July 28 I requested on behalf of the American Cylinder Manufacturers Committee that the Materials Transportation Bureau (MTB) establish certain procedures to be followed in ruling on: (1) A person's application filed with the Department of Transportation (DOT), pursuant to 49 C.F.R. §173.3003, for approval as an "Independent Inspection agency for the purpose of performing cylinder inspections and verifications required by [49 C.F.R. Part 178]"; and (2) a foreign manufacturer's application filed with DOT, pursuant to 49 C.F.R. §173.300b, for approval "to have the chemical analyses and tests of [its] cylinders required by [49 C.F.R. Part 178] performed outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials to, from or within the United States."

We have had no response to that request other than notification that it had been received and assigned a file number. It is my understanding that the following companies have already filed requests for permission to perform chemical analyses and inspect compressed gas cylinders outside the United States:

Mr. James T. Curtis, Director
September 24, 1976
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Engineering Products of Canada, Ltd.
150 Industrial Boulevard
Boucherville, Quebec, Canada

Sumikin Kiko Company, Ltd.
Hyogo, 660
Japan

Kammerich - Reisholz GMBH
Dusseldorf - Reisholz
Federal Republic of Germany

T. I. Chesterfield
Chesterfield Derbyshire
England

I assume that no action has been taken on these requests. We believe that the formal procedures outlined in our July 28 submission should be utilized by MTB in passing upon such requests.

Sincerely,

WILLIAM W. SCOTT

COLLIER, SHANNON, RILL, EDWARDS & SCOTT

ATTORNEYS AT LAW

1055 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007

February 17, 1977

ROBERT A. COLLIER
THOMAS F. SHANNON
JAMES F. RILL
MAX N. EDWARDS
WILLIAM W. SCOTT
PHILIP G. OLSSON
DONALD E. KRIEGER
RONALD A. KOLINS
DAVID A. HARTQUIST

RICHARD E. SCHWARTZ
J. STEPHEN STREET
R. TIMOTHY COLUMBUS
LAUREN R. OLDAN
MARTIN A. ROSEN
KATHLEEN E. McDERMOTT
MICHAEL D. SHERMAN
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TELEX
COLSHAN 84482
OF COUNSEL
STANLEY R. RADER

Mr. James T. Curtis, Director
Materials Transportation Bureau
United States Department of Transportation
Trans Point Building, Room 6224
2100 Second Street, S.W.
Washington, D.C. 20590

Re: P-548

Dear Mr. Curtis:

This letter is in regard to the July 23, 1976 request of the American Cylinder Manufacturers Committee (ACMC) that the Materials Transportation Bureau (MTB) establish and implement formal procedures in ruling on: (1) A person's application filed with the Department of Transportation (DOT), pursuant to 49 C.F.R. §173.300a, for approval as an "independent inspection agency for the purpose of performing cylinder inspections and verifications required by [49 C.F.R. Part 178]"; and (2) a foreign manufacturer's application filed with DOT, pursuant to 49 C.F.R. §173.300b, for approval "to have the chemical analyses and tests of [its] cylinders required by [49 C.F.R. Part 178] performed outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials to, from or within the United States." William W. Scott, on behalf of ACMC, repeated this request by letter dated September 24, 1976, and again raised the question about the procedures to be followed in considering applications from foreign manufacturers and inspection agencies at a meeting with Dr. C. Hugh Thompson, Paul Seay, and Douglas Crockett on November 16, 1976.

1/
It now appears that MTB has simply disregarded ACMC's request concerning applications filed pursuant to the licensing provisions

1/ ACMC's July 28, 1976 request was assigned a number, P-548, on August 2, 1976, but no further action on the request has apparently been taken in the ensuing seven month period.

COLLIER, SHANNON, RILL, EDWARDS & SCOTT

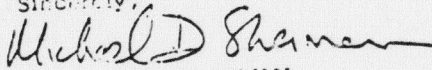
Mr. James T. Cuntis
Page Two
February 17, 1977

of 49 C.F.R. §§173.300a, 173.300b, and is proceeding to rule on applications from foreign manufacturers and inspection agencies in accordance with a procedure which is known only to MTB and which provides no opportunity for comment by interested persons. By failing to implement the licensing procedures specified in APMC's request or similar procedures for use in the consideration of the license applications filed pursuant to 49 C.F.R. §§173.300a, 173.300b, MTB has directly violated Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c), which states:

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. [emphasis supplied]

APMC again requests that MTB implement the procedures specified in APMC's July 28, 1976 letter with respect to all applications which have been, and will be, submitted to DOT pursuant to 49 C.F.R. §§173.300a, 173.300b. In light of the legal imperative contained in 5 U.S.C. §558(c), APMC requests MTB to hold in abeyance its consideration of applications from foreign compressed gas cylinder manufacturers and independent inspection agencies until a lawful procedure for consideration of such license applications is established. Since APMC's request has been "pending" for almost seven months, it is respectfully submitted that no more than an additional two weeks should be necessary for MTB to initiate a rulemaking proceeding in order to establish procedures comporting with 5 U.S.C. §558(c) for consideration of applications which have been filed pursuant to 49 C.F.R. §§173.300a, 173.300b. If MTB fails within this two week period to (1) initiate such a rulemaking proceeding and (2) stay its consideration of applications from foreign compressed gas cylinder manufacturers and independent inspection agencies, then APMC will have no other recourse but to seek judicial action to force MTB to comply with the provisions of 5 U.S.C. §558(c).

Sincerely,


MICHAEL D. SHERMAN

2/ The provisions of the Administrative Procedure Act require the
agency to provide a hearing and a decision on the merits.



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DEPARTMENT OF TRANSPORTATION
MATERIALS TRANSPORTATION BUREAU
WASHINGTON, D.C. 20590

August 2, 1976

Mr. William W. Scott
Executive Secretary
American Cylinder Manufacturers Committee
1666 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Scott:

Thank you for your petition for rule change of the Hazardous Materials Regulations, dated July 28, 1976 on the subject of: publishing applications under §173.300b, in the Federal Register; allow 30 days for comment, etc.

The petition has been assigned No. P-548. If you should write to us regarding this petition, please make reference to the petition number.

Sincerely,

A handwritten signature in cursive script, reading 'A. Louise Mills', is positioned above the typed name.

A. Louise Mills
Dockets Section
Regulations Division
Office of Hazardous Materials Operations

*Received
by [unclear] [unclear]
by [unclear] [unclear]*

*Received
by [unclear] [unclear]
by [unclear] [unclear]*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,
-against-

DEPARTMENT OF TRANSPORTATION,
et al.,

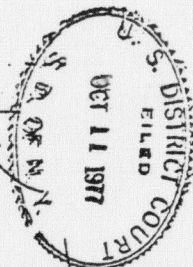
Defendants.

ORDER TO SHOW CAUSE
AND AFFIDAVITS

LORD, DAY & LORD,
ATTORNEYS FOR
Plaintiff

25 BROADWAY
NEW YORK, N. Y. 10004

AREA CODE 212-344-6460



77 Civ 4348 (ms)

Subpoena

*Application for Preliminary
Injunction to compel [unclear]
with a trial on the merits which
is to be held on October 10, 1977
at 10:30 AM in Courtroom 1306*

*S. O. [unclear] [unclear]
October 3, 1977 [unclear]
U.S.D.J.*

1977-1-130

WITNESSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO. ENDORSED-

JULIE FULLACK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

-against-

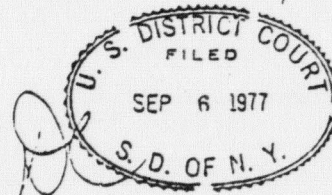
DEPARTMENT OF TRANSPORTATION,
BROCK ADAMS, as Secretary of Transportation,
JOHN FEARNSIDES, as Acting Director of the
Materials Transportation Bureau,
ALAN ROBERTS, as Acting Director, Office
of Hazardous Materials Operations,
and
ENGINEERING PRODUCTS OF CANADA,
LTD.,

Defendants.

77 CIV. 4358

77 Civ.

ORDER TO SHOW CAUSE
FOR A PRELIMINARY INJUNCTION
AND A STAY ...



Upon consideration of the accompanying affidavits of Richard E. Schwartz sworn to on September 2, 1977, Kathleen K. Kelly sworn to on September 1, 1977, Lane Hoffman sworn to on August 23, 1977, and Ralph O. Tribolet sworn to on August 18, 1977, and the "Memorandum In Support Of Plaintiff's Motion For Preliminary Injunction" submitted herewith, and sufficient cause appearing therefore, it is:

ORDERED that defendants Department of Transportation, Brock Adams, John Fearnside, Alan Roberts, and Engineering Products of Canada Ltd., or their attorneys, show cause before this Court at a term to be held at the United States Courthouse located at 40 Centre Street, New York, New York on September 30, 1977 at 2 P.m. or as soon thereafter as each counsel can be heard, why an order should not be entered (1) staying the effective date of the approval issued on August 31, 1977 by defendant Alan Roberts, Acting Director, Office of Hazardous Materials Operations ("OHMO") to defendant Engineering Products

of Canada, Ltd., pursuant to 49 C.F.R. §173.300b; (2) staying the effective date of any other approvals which have been issued by defendants Department of Transportation ("DOT"), Adams, Fearnside, or Roberts pursuant to 49 C.F.R. §173.300 a or b; and (3) enjoining DOT, Adams, Fearnside, and Roberts and their official successors from making any additional approvals pursuant to 49 C.F.R. §173.300 a or b except under procedures conforming to the requirements of 5 U.S.C. §§556 and 557; and it is further

ORDERED that ^{personal} service of a copy of this Order to Show Cause and the supporting papers be made upon defendants on or before Sept 7, 1977, at 4, .M.; and it is further

ORDERED that any and all answering affidavits and memoranda of law be served upon the attorneys for plaintiff at their offices on or before Sept 26, 1977, at 4, .M.; and it is further

ORDERED that pending the disposition of this motion and the entry of an order thereon: (1) the approval issued on August 31, 1977 by defendant Alan Roberts, Acting Director, Office of Hazardous Materials Operations to defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300 b is stayed; (2) any other approvals which have been issued by defendants DOT, Adams, Fearnside, or Roberts or their official successors pursuant to 49 C.F.R. §173.300 a or b are stayed; and (3) defendants DOT, Adams, Fearnside and Roberts and their successors are enjoined from making any additional approvals pursuant to 49 C.F.R. §173.300 a or b except under procedures conforming to the requirements of 5 U.S.C. §§556 and 557.

It is so ORDERED.

dated: Sept 7, 1977

S/ MILTON POLLACK
United States District Judge

AFFIDAVIT OF LANE HOFFMAN

State of Illinois, County of Kane)ss.:

Lane Hoffman being first duly sworn, deposes and says:

1. My name is Lane Hoffman and I reside at 475 South Elgin Blvd., South Elgin, Illinois, 60177. Since 1974 I have been the Chairman of the American Cylinder Manufacturers Committee (ACMC).

2. I am also the President of the Marison Company, which manufactures compressed gas cylinders.

3. The American Cylinder Manufacturers Committee (ACMC) is an unincorporated association of domestic cylinder manufacturers formed in 1971. ACMC's members produce approximately 90% of all domestically produced compressed gas cylinders. ACMC was established to provide an organization through which its members could participate in Department of Transportation (DOT) rule-making Docket #HM-74 and to represent the common interests of its members.

4. As Chairman of ACMC I conduct the association's business out of my office at the Marison Company which is located at 50 North River Street in South Elgin, Illinois.

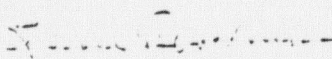
5. ACMC has actively participated in rule-making Docket #HM-74 since 1971, when DOT first proposed the rule-making.

6. ACMC has requested that DOT recognize its statutory duty to afford ACMC and other interested parties an opportunity to participate in the process of granting approvals to foreign manufacturers and new inspection agencies. DOT has treated this request as a petition for rule change and assigned it Docket #P-548. I know of no further action, taken by DOT, on ACMC's request.

7. Members of ACMC will be irreparably harmed if approvals are granted by DOT pursuant to 49 C.F.R. 173.300 a or b. Harm will include the loss of cylinder sales and the loss of those rights guaranteed by Section 9 (b) of the Administrative Procedure Act, 5 U.S.C., Section 558(c). In addition, loss of cylinder sales will cause a reduction in employment in the domestic cylinder industry.

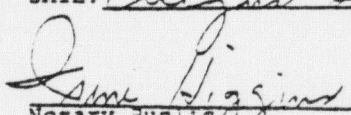
8. ACMC has authorized the filing of this suit to challenge the licensing procedures undertaken by DOT pursuant to 49 C.F.R. 173.300 a and b.

Respectfully submitted,


Lane Hoffman

Subscribed and sworn before me

DATE: August 23, 1977


Notary Public

My commission expires Sept. 25, 1979

AFFIDAVIT OF RALPH O. TRIBOLET

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF ESSEX

Ralph O. Tribolat, being first duly sworn, deposes and says:

1. My name is Ralph O. Tribolat and I reside at 128 Howell Drive, Somerville, New Jersey 08876. I am the Manager of Technical Services - Cylinders for the Linde Division of Union Carbide Corporation.
2. I have been an engineer for Union Carbide for thirty-three years, 30 of which have been spent working with compressed gas cylinders.
3. I am the Chairman of the Sub-Committee on Cylinder Design, Proof and Service Performance Tests of the Compressed Gas Association's Committee on Cylinder Specifications. I have been a member of the Cylinder Specifications Committee for twenty-two years.
4. I am a United States delegate to the United Nations Committee on Cylinder Specifications and a United States delegate to the International Standards Organization Committee for Cylinder Specifications.
5. I have calculated that a standard 51" x 9" oxygen cylinder, a cylinder in wide use in American industry, filled to a standard pressure of 2200 psig, has the destructive force of twenty-four sticks of dynamite or approximately one-half pound of TNT.
6. The safety of a compressed gas cylinder is dependent upon its being properly manufactured, inspected and maintained.
7. Minor and unsuspecting looking faults in a cylinder can be extremely dangerous and may lead to fatal accidents. For example, in January 1971, an experienced Union Carbide inspector had inspected a used cylinder, similar to the cylinder described in paragraph (5) above, and approved it for refilling. As this cylinder was being refilled, it ruptured and a Union Carbide worker standing near the cylinder was hit by the exploding cylinder and killed instantly.
8. It was determined that the rupture was caused by a scratch only .045" deep which ran the length of the cylinder.

Date: _____

Ralph O. Tribolat

Subscribed and sworn to before me
this _____ day of _____
1977.

Notary Public

My commission expires: _____

AMERICAN CYLINDER
MANUFACTURERS COMMITTEE

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

Civil Action No.

77 Civ. 4358(MP)

Washington)
District of Columbia) ss.

AFFIDAVIT OF A. LOUISE MILLS

The affiant, being duly sworn, deposes and says:

1. My name is A. Louise Mills. I am Chief of the Dockets Section, within the Materials Transportation Bureau. I am making this affidavit on my own knowledge and upon the information and belief available to me in my official capacity.

2. The Dockets Section is responsible for maintaining all official rulemaking and other records, including foreign cylinder approval and approval applications, for viewing by members of the public as well as DOT personnel. Those records are kept in Room 6500, Trans Point Building, 2100 Second Street, S.W., Washington, D.C. In addition, the Dockets Section responds to both telephone and written inquiries concerning the existence, location, viewing and provision of copies of Docket records.

3. To the best of my recollection, the cylinder approval file presently maintained by the Dockets Section was opened sometime early in 1977. That file has been available for public viewing since that time.

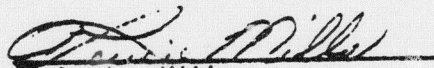
4. On a number of occasions since the cylinder approval file was opened, persons representing the local law firm of Collier, Shannon, Rill, Edwards and Scott have visited the Dockets Room to examine that file.

5. On August 2, 1977, Ms. Patricia Cirillo examined the approval file, as did Ms. Kitty Kelly on September 1, 1977. On September 9, 1977,

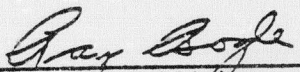
Ms. Kelly and a Mr. Spangburg examined the file. I understood those persons to be from that law firm. In addition, Ms. Kelly visited the Dockets Room on September 1, 1977, obtaining copies of the first two cylinder approvals that had been issued the preceding day. On September 2, 1977, the firm sent a messenger to pick up copies of the second two approvals issued on September 1, 1977.

6. In addition to these specific dates, representatives of Mr. Scott's law firm, since at least the beginning of July, have visited the Dockets Room to examine the approval file.

7. To date, no comments have been received by the Dockets Section from persons outside the Department of Transportation for inclusion in the foreign cylinder approval file. I do not know whether or not such comments have been received by Departmental personnel not located in the Dockets Section.


A. Louise Mills

Subscribed and sworn to before me this 16th day of September, 1977.



(Notary Public)

My commission expires May 1, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

-v-

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

AFFIDAVIT
77 Civ. 4358(MP)

DISTRICT OF COLUMBIA)

WASHINGTON, D.C.) ss.:
)

ALAN I. ROBERTS, being duly sworn, deposes and
says:

1. I am Director of the Office of Hazardous Materials Operations, Materials Transportation Bureau, United States Department of Transportation. I am making this affidavit on my own knowledge and belief and upon information available to me in my official capacity.

2. The function of the Office of Hazardous Materials Operations (OHMO) is to prescribe regulations governing the transportation of hazardous materials in commerce in the United States, and to enforce those regulations insofar as they concern shippers of hazardous materials and manufacturers of hazardous materials containers. Other related enforcement functions are performed by separate operating administrations within the Department, such as the Bureau of Motor Carrier Safety of the Federal Highway Administration. The OHMO functions include responsibility for prescribing, administering and enforcing regulations governing the manufacture and transportation in commerce in the United States of compressed gas cylinders.

3. On May 4, 1976, under Docket No. HM-74, the Materials Transportation Bureau published in the Federal Register (41 FR 19412) amendments to 49 CFR Parts 173 and

178 concerning foreign-made compressed gas cylinders. Those amendments were based on a rulemaking proceeding that was commenced by a Federal Register publication of January 19, 1971 (36 FR 838). Since its formation in July 1971, the American Cylinder Manufacturers Committee (ACMC) has participated very extensively in those proceedings and provided comments to the public docket on almost every aspect of the proposed EM-74 amendments. I am not aware that ACMC at any time during the rulemaking commented on a perceived need for public notice, opportunity for comment, or public hearings for the benefit of domestic cylinder manufacturers with regard to each approval application submitted, although such matters were within the scope of the rulemaking.

4. On June 3, 1976, ACMC petitioned the Materials Transportation Bureau, pursuant to 49 CFR 102.35, for reconsideration of the EM-74 amendments. That petition did not raise any question of notice, comment and hearings on each approval application. These matters were first raised by ACMC in a letter to Mr. James T. Curtis, Director, Materials Transportation Bureau, dated July 28, 1976.

5. Under the Department of Transportation's gas cylinder regulations, all cylinders used in domestic commerce must have been inspected, tested and chemically analyzed in accordance with the Department's cylinder specifications (49 CFR Part 178). Inspection generally must be performed during manufacture, involving examination of various components and surfaces of the cylinders. Tests involve physical stressing of cylinders and tests on the physical properties of the metals in completed cylinders. Chemical analysis is required to determine the composition of the metals in the cylinder.

6. The cylinders described in the Department's specifications fall into two categories, high and low pressure, one distinction between the two categories being the kind and degree of inspection and testing required. Requirements applicable to high pressure cylinders have historically been somewhat more stringent than those applicable to low pressure cylinders. In particular, high pressure cylinders for quite some time have been required to be inspected by persons not employed by the cylinder manufacturer, while inspection of low pressure cylinders by employees of the manufacturer was permitted.

7. The HM-74 amendments did not affect the requirement that all DOT specification cylinders be inspected, tested, and chemically analyzed to qualify them for use in commerce in the United States. However, under the old rules, all tests and analyses had to be performed in the United States, while inspection could be performed anywhere. For high pressure cylinders, the old rules required a "disinterested" inspector, approved by the Bureau of Explosives, Association of American Railroads (a trade association) under a delegation from the Department (and between 1923 and 1967, from the Interstate Commerce Commission) to perform inspections and also to verify or confirm the results of tests and analyses. For low pressure cylinders, the old rules allowed employees of the cylinder manufacturer ("interested" inspectors) to perform inspections and verify tests and analyses. The old rules imposed no restriction, in either case, on who actually performed tests and analyses, so long as they were performed within the United States.

8. The HM-74 amendments now require foreign manufacturers of low pressure cylinders, as well as domestic

and foreign manufacturers of high pressure cylinders, to use independent inspection agencies (functionally equivalent to the old "disinterested" inspectors), approved directly by the Department rather than through the Bureau of Explosives. In the event a foreign manufacturer wishes to conduct tests and analyses outside the United States, that manufacturer in addition is himself required to obtain the Department's approval. Thus, the amendments require at least one Departmental approval (inspection agency), and usually two approvals (inspection agency and manufacturer), before any DOT specification cylinder may be manufactured outside the United States. Approvals are conditioned upon unannounced access by Departmental personnel to the manufacturing/testing site, such access not being assured under the old rules.

9. Through the approvals required by the EM-74 amendments, the Department's control over the manufacture of DOT specification cylinders is greatly augmented. Previously, only high pressure cylinder manufacturers used "disinterested" inspectors, who were approved by the Bureau of Explosives. Now, independent inspectors are required for all foreign manufacturers, as well as domestic high pressure manufacturers, and those inspectors must be approved directly by this Department. A foreign manufacturer who conducts tests and analyses outside the United States, in addition to using an approved inspector, must himself be approved by the Department. Even if he avoids submitting himself to the Department's approval examination by conducting tests and analyses within the United States, he still cannot manufacture cylinders without using an independent inspection agency approved by the Department, which approval will involve an examination of his manufacturing site by the Department.

10. Under Docket HM-74, the Department also proposed to require domestic manufacturers of low pressure cylinders to use independent inspection agencies. However, that proposal was made late in the rulemaking proceedings and was subsequently severed from HM-74. The proposal is still under active consideration.

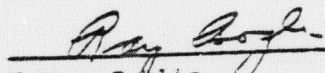
11. With one exception which occurred after the HM-74 rulemaking was opened, I am not aware that the Bureau of Explosives ever granted any disinterested inspector authority to inspect DOT Specification compressed gas cylinders outside the United States, for cylinders intended to be used in commerce within the United States.

12. While the Department of Transportation is responsible for safety and not for economic regulation, it does attempt to avoid the possible imposition of economic effects when consistent with safety. The HM-74 amendments appear to have significantly reduced barriers to trade by enabling foreign cylinder manufacturers to secure the services of independent inspection agencies approved for foreign inspection, and by providing a means whereby tests and analyses of gas cylinders may be performed outside the United States.


Alan I. Roberts

Sworn to before me this

20th th day of September 1977.


Notary Public
My commission expires May 1, 1982

AMERICAN CYLINDER
MANUFACTURERS COMMITTEE

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION,
et al.,

Defendants.

Civil Action No.

77 Civ. 4358(MP)

AFFIDAVIT OF QUENTIN E. BANKS

The affiant, being duly sworn, deposes and says:

1. My name is Quentin E. Banks. I presently live at 136 Jericho Path, Falmouth, Massachusetts 02540, and I am employed by Traffic and Distribution Services, Incorporated, Lexington, Massachusetts, as a Consulting Associate. In my individual capacity, I also offer a transportation consulting service that specializes in the area of hazardous materials. I am making this affidavit on my own knowledge, and based upon the information and belief available to me in my official capacity during my employment with the Office of Hazardous Materials Operations, Department of Transportation.

2. Before my employment with the Department of Transportation in 1968, I worked in varying capacities for the Boston and Maine Railroad (now the Boston and Maine Corporation), a common carrier by rail engaged in interstate commerce, from 1942 until 1957. My responsibilities during that time included duties concerning the handling and transportation of explosives from the port of embarkation in Boston during World War II.

3. From July 6, 1968, until December 7, 1973, I was the Assistant Chief, Hazardous Materials Branch of the Safety Programs Division, Office of Safety, Federal Railroad Administration, Department of Transportation. From December 7, 1973, until my retirement from Federal employment on September 9, 1977, I was Chief of the Compliance Branch, Office of

- 33 -

have served as a member of the Surgeon General's Committee on Toxic Materials from 1972 to 1974. From August 1972, until later 1973, I also served as the Federal Railroad Administration representative at meetings of the Group of Experts on Explosives and the Rapporteurs on Dangerous Goods, international organizations sanctioned by the United Nations. I have also served on occasion as the DOT representative at RIDAR/ADR (European Convention concerning carriage of dangerous goods by rail and road respectively) meetings.

4. As Chief of the Office of Hazardous Materials Operations Compliance Branch, I supervised the Office of Hazardous Materials Operations enforcement and compliance program, including field inspection of container manufacturers, and the approval and registration of drums and cylinders. That program required extensive inspection of container manufacturers including cylinder manufacturers, as well as container retesting facilities.

5. In November of 1976, the foreign cylinder approval program was assigned to the Compliance Branch for evaluation. I proposed and the Director, MTS, agreed to begin plant inspections with Engineering Products of Canada, Limited, in December of 1976, and to attempt one plant inspection per month thereafter. I also began the selection of a contract laboratory capable of performing verification testing of the sample cylinders picked up during the approval inspections. On May 16, 1977, that contract was issued to IITRI, Incorporated, Chicago, Illinois. I was the contract officer for this project.

6. As of September 9, 1977, the following companies had submitted approval applications and were awaiting processing:

Independent Inspection Agencies

Arrowhead Industrial Services, Inc.
West Orange, New Jersey 07052
Independent Agency
Application

Lloyd's Register Industrial Services
Norfolk House, Croydon CR 92DT
Application

British Engine
Boiler and Electrical Insurance Co., Ltd
Application

Application

- 34 -

Warnock Hershey Professional Services Ltd
128 Elmslie Street, La Salle, P.A.
514-366-3100
Application

Robert W. Hunt Company
810 South Clinton Street
Chicago, Illinois 60607

Bureau Veritas
United States Central Office
17 Battery Place
New York, New York 10004

Foreign Manufacturers

T. I. Chesterfield
Chesterfield, Derbyshire S402EA
England

Totsuka Cylinder Corporation
Tokyo, Japan

Sumikin Kiko Company, Ltd - Amagasaki, Japan
Sumitomo Metal America, Inc.
420 Lexington Avenue
New York, New York 10017

Showa Koatsu Kogyo Company, Ltd
Tokyo, Japan

Kammerich-Reisholz GMBH
400 Drisseldorf 13 Germany

Engineering Products of Canada, Ltd
Boucherville, Quebec, Canada

Vallourec
Usine Mont D'Anzin
Rue Gustave Thiatard
59410 Anzin France

Tanques Para Gas, S. A.
Centro Ciudad Commercial Tamanaco
Office 420
Caracas Venezuela

Sambre Loire
Aerogare De Bron
69500 - Bron France

7. As of September 9, 1977, the following cylinder manufacturers and inspection agencies had been inspected, on the dates shown:

T. I. Chesterfield	3/4-5/77
Totsuka Cylinder Corporation	6/26-28/77
Sumikin Kiko Company, Ltd	1/20-21/77
Showa Koatsu Kogyo Company, Ltd	1/17-18/77
Kammerich-Reisholz GMBH	2/28 & 3/1/77
Engineering Products of Canada, Ltd	12/16-17/76
Arrowhead Industrial Services, Inc.	1/17-18/77
Lloyd's Register Industrial Services	3/4-5/77
British Engine	3/4-5/77
Boiler and Electrical Insurance Co.	
International Inspection Co., Ltd	1/20-21/77
	6/26-28/77

8. At the time my employment with DOT terminated, four approvals had been issued. Those approvals and the dates of issuance follow:

Engineering Products of Canada Limited	August 31, 1977
Warnock Hershey Professional Services Limited	August 31, 1977
Showa Kotsu Kogyo Company Limited	September 1, 1977
Arrowhead Industrial Services, Incorporated	September 1, 1977

9. My first contact with the law firm of Collier, Shannon, Rill, Edwards and Scott, in its capacity as counsel for the American Cylinder Manufacturers Committee, occurred in January of 1977. Kitty Kelly of that firm requested and was furnished a copy of the pending approval applications on January 11, 1977. Following that, until I left DOT, I received numerous telephone calls from Kitty Kelly, Patricia Cirillo, Michael Sherman and Richard Schwartz, all of that law firm.

10. The American Cylinder Manufacturers Committee requested on January 31, 1977, under the Freedom of Information Act copies of documents in connection with the approval applications. We answered in a letter dated February 13, 1977, releasing some of the material sought by announcing that the released material, as part of the approval applications could be found in a publicly available file in Room 6500 of the Trans Point Building, 2100 Second Street, S.W., Washington, D.C. At the time the answer was sent, I prepared the application documents in my possession for the public file.

11. At the time I left DOT employment, I knew of no written or verbal comments from persons outside DOT regarding the completeness or safety implications of material submitted by approval applicants and placed on public view. I understood from my conversations with Kitty Kelly that she has examined the approval applications on several occasions.

12. On August 31, I called Kitty Kelly and informed her that the first set of approvals to Engineering Products and Warnock Hershey had been issued and that copies were available in the Docket Room. Late the following day, September 1, 1977, I instructed my Secretary, Rita L. Sikorsky, to call Ms. Kelly the next morning to let her know that the second set of approvals had been issued.

Subscribed and sworn to before me this _____ day of September, 1977.

(Notary Public)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
AMERICAN CYLINDER MANUFACTURERS COMMITTEE, :

Plaintiff :

-vs- :

DEPARTMENT OF TRANSPORTATION; :
BROCK ADAMS as Secretary of Transportation; :
JOHN J. FEARNSIDES as Acting Director; : 77 Civ. 4358
Materials Transportation Bureau; :
ALAN I. ROBERTS as Acting Director, Office :
of Hazardous Materials Operations; and :
ENGINEERING PRODUCTS OF CANADA, LTD., :

Defendants :

-----X
B E F O R E:

HON. MILTON POLLACK,
District Judge

New York, New York
September 30, 1977--1:45 p.m.

A P P E A R A N C E S:

RICHARD E. SCHWARTZ, ESQ.,
STEPHEN J. CRIMMINS, ESQ.,
MICHAEL SHERMAN, ESQ.,
RICHARD PAPPER, ESQ.,
DOUGLAS CROCKETT, ESQ.,
JOHN COLLINS, ESQ.,
HUGH PLUMMER, ESQ.,
JAMES RYAN, ESQ.,
PETER MCCAUSLAN, ESQ.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y.

1. rmda

RI

2 MR. PAPPER: Your Honor, I am Richard Papper,
3 Assistant United States Attorney.

4 THE COURT: Do you have any objection to
5 taking this testimony?

6 MR. PAPPER: Yes, we do.

7 THE COURT: I will hear the testimony and
8 you can object and strike it out, if necessary.

9 MR. COLLINS: I represent Engineering Products
10 of Canada, your Honor. We have a witness here today and
11 we would like to reserve the right to preserve his testi-
12 mony.

13 THE COURT: From where?

14 MR. COLLINS: Montreal, Canada.

15 MR. PLUMMER: Your Honor, we are here on our
16 application to intervene in this matter and we have two
17 witnesses --

18 THE COURT: I won't worry about any inter-
19 ventions today.

20 MR. PLUMMER: We have two witnesses from out
21 of town relevant to the issues before the Court.

22 THE COURT: That may be, but this interven-
23 tion motion can be determined before the proceedings are
24 closed.

25 MR. PLUMMER: Your Honor, I think the

1 rmds.

2 intervention becomes critical, from our point of view, since
3 the matter before the Court today is addressed to the
4 preliminary injunction.

5 THE COURT: I am not going to decide that
6 today.

7 MR. PLUMMER: If your Honor takes testimony
8 on it, we would believe it appropriate that the testimony
9 we propose to tender is relevant to that issue and I under-
10 stood the testimony being offered is on that particular
11 point.

12 THE COURT: You are still not saying anything
13 different from what I am saying. I am saying to you that
14 I thought I would accommodate two people from the mid-West
15 and that didn't mean I was closing the hearings here.
16 You are asking for an opportunity to be heard and you will
17 be heard during the time we are accumulating a record for
18 the purposes of a disposition.

19 MR. PLUMMER: Would it be appropriate to
20 ask what the purpose of the testimony is?

21 THE COURT: Is there any rational basis for
22 sending this to a magistrate who can hear these witnesses
23 and send up a report, or is that just going to be a
24 delaying operation?

25 MR. SCHWARTZ: I don't think there will be

1 rmds

2 much testimony presented here. The two witnesses that we
3 have today are the only witnesses which we propose to offer.

4 THE COURT: Who do you represent?

5 MR. SCHWARTZ: The American Cylinder Manu-
6 facturers Committee, the plaintiffs.

7 THE COURT: Put your witnesses on the stand.
8 We will solve all these questions by testimony rather than
9 conversation.

10 MR. PAPPER: The government's objections will
11 be reserved until after the testimony.

12 THE COURT: Everything is reserved. These
13 witnesses are merely being heard provisionally and without
14 prejudice to your right to claim they shouldn't have been
15 heard in the first place, and what they have to say is
16 irrelevant, in the second place, and that goes for everybody.

17 MR. PLUMMER: Will we be afforded an oppor-
18 tunity to cross-examine, your Honor?

19 THE COURT: We will see about that as we pro-
20 ceed. I can't make any advance commitments. There is only
21 going to be about twenty minutes. I have excused the jury
22 until ten minutes after 2:00, so let's not interrupt with
23 colloquy.

24 I take it somebody is going to order these
25 minutes, is that right?

1 rmds Spangenberg - direct

2 MR. SCHWARTZ: Yes, sir.

3 THE COURT: Therefore, I won't attempt to
4 keep personal notes, on the assumption I will have a tran-
5 script of the record.

6 MR. SCHWARTZ: There is an amended complaint
7 we are offering, your Honor (handing).

8 THE COURT: Don't give me an amended complaint
9 that you have to file downstairs. If you are giving it to
10 me for information, that would be all right.

11 ROBERT F. SPANGENBERG, called as a
12 witness in behalf of the plaintiff, being first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SCHWARTZ:

16 Q Mr. Spangenberg, where do you reside?

17 A I live in New Berlin, Wisconsin.

18 Q What is your educational background?

19 A I am an engineering graduate. I have a BS
20 degree in chemical engineering from Northwestern University,
21 also have some graduate training in metallurgy from the
22 University of Wisconsin.

23 Q Could you describe your employment background?

24 A I have been employed with two companies,
25 initially with Babcock & Wilcox, in Milwaukee, and since

1 rmbs Spangenberg - direct

2 1949 I have been employed by Pressed Steel Tank Company.

3 Q What does Pressed Steel Tank Company manu-
4 facture?

5 A We manufacture various compressed gas cylinders
6 and other pressure vessels.

7 Q What are your duties with this company?

8 A I am an officer of the company, I am the vice
9 president of engineering and quality assurance, which in-
10 volves the responsibility for product design, designing of
11 the product, which is compressed gas cylinders, to the
12 requirements of the customer and to the various requirements
13 of regulatory bodies such as the Department of Transporta-
14 tion.

15 Q Could you describe your professional activities
16 that relate to your employment?

17 A I am a member of the American Society for
18 Metals, the American Society for Mechanical Engineers, and
19 I am quite active with the various committees of the
20 Compressed Gas Association.

21 Q Are you involved in any international organiza-
22 tions?

23 A Yes, I am. Through the Compressed Gas Asso-
24 ciation I am a U.S. delegate to the International Standards
25 Organization which is working on specifications for cylinders

1 rmds Spangenberg - direct
2 for international sue.

3 I am also an industry representative on the U.N.
4 working group headed by the Department of Transportation,
5 again for developing construction specifications for gas
6 cylinders.

7 Q You mentioned that you were a member of the
8 Compressed Gas Association --

9 THE COURT: Let's get on with something
10 material. This is qualifications and you don't have to
11 qualify this man to that degree.

12 Q Could you please describe the Compressed Gas
13 Association?

14 A The Compressed Gas Association consists of
15 various companies who have interests in the compressed
16 gas industry. They manufacture gases, distribute and ship
17 these gases and they also have members who are cylinder
18 manufacturers, valve manufactures, and other items which are
19 related to the containment of these gases. The membership
20 of this association is not acutally a trade association, it
21 is primarily interested in safety in this industry as well
22 as the technical aspect of it.

23 Q Could you describe the sub-committee you were
24 in charge of what it does?

25 A I have been, at various times, on different

1 rmds Spangenberg - direct
2 sub-committees, but in particular I have a lot of experience
3 in recent years with one relating to inspection of cylinders,
4 the sub-committee of the Cylinder Specification Committee.

5 Q Could you describe how your committee has
6 dealt with this subject?

7 THE COURT: I think you are going to run
8 yourself out of time with a whole lot of irrelevancies.
9 Why don't you get down to what you called this man here for
10 and leave all this other stuff aside unless it is put in
11 issue by somebody?

12 MR. SCHWARTZ: Your Honor, the government has
13 alleged that our only interest in this case is economic and
14 that, therefore, we do not have standing because our only
15 interest is that we are being injured by lawful competition
16 and that we have no standing in this case. We contend that
17 our interest is that we participate in fact before the
18 Department of Transportation in all phases of the regulatory
19 activity of the Department of Transportation and the Depart-
20 ment's sources for most specifications is the industry itself
21 and that the industry as been welcomed by the Department
22 of Transportation at every phase of the regulatory process
23 except for this particular kind of licensing.

24 Therefore, your Honor, the purpose of
25 Mr. Spangenberg's testimony is to show in fact that the

1 rmds Spangenberg - direct
2 industry has been actively involved and usefully involved
3 in this process and the Department of Transportation wel-
4 comes this involvement, which is why I am asking about his
5 activities in the compressed gas industry.

6 THE COURT: Is there any issue about anything
7 which has just been stated, apart from whether it is rele-
8 vant? Is there any issue?

9 MR. PAPPER: Apart from whether it is relevant,
10 no, your Honor.

11 THE COURT: Then you don't have to go on
12 with that phase.

13 MR. SCHWARTZ: If I may, I will put in docu-
14 ments in evidence through Mr. Spangenberg.

15 THE COURT: Do anything you want.

16 Q I hand you a copy of a document entitled
17 "Proceedings of The Cylinder Specification Committee" dated
18 December 2 and 3, 1971. Could you identify that document?

19 THE COURT: I don't think you need to do that.
20 Show the documents to the other side, find out if they have
21 any objection to their admission in evidence, and offer them
22 in evidence.

23 MR. SCHWARTZ: All right.

24 THE COURT: Anything which has received subject
25 to ultimate rulings on relevancy and materiality. The only

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2 question you need to pass upon presently is authenticity.

3 MR. PAPPER: We have no objection, on those
4 grounds, your Honor.

5 MR. SCHWARTZ: I offer this in evidence.

6 THE COURT: Received.

7 (Plaintiff's Exhibit 1 received in evidence)

8 THE COURT: Anything else?

9 MR. SCHWARTZ: I am checking, your Honor.

10 Q Mr. Spangenberg, I am showing you some documents

11 which contain letters from the Department of Transportation,
12 minutes from Compressed Gas Association meetings, and I
13 ask you whether those documents were used by D.O.T. in
14 formulating specifications?

15 A Yes, there have been a number of instances
16 where either our company or people in the industry have
17 submitted comments as a response to rule-making and these
18 comments have been taken note of resulted in changes in the
19 initial form of the rule-making.

20 MR. PAPPER: Your Honor, I think this witness
21 is not competent to testify as to what the Department of
22 Transportation in fact did with respect to these letters,
23 only as to whether they were sent.

24 THE COURT: I will consider his answer as
25 merely his assumption and not binding on the Department of

1 rmds Spangenberg - direct

2 Transportation.

3 MR. SCHWARTZ: May I ask the witness why he
4 believes his answer is true?

5 THE COURT: Yes.

6 Q Can you explain why you think the Department
7 of Transportation in fact has acted on industry suggestion?

8 A Well, through the actual notices that came
9 from the Department of Transportation, the change in the
10 original form, which came out for public review.

11 Q How did those changes relate to the suggestions
12 made by industry?

13 A They took note of the suggestions that I have
14 in mind. I can refer to particular notices, if you like.

15 Q I would like you to.

16 A I am talking about HM-3, HM-13, HM-23.

17 Q What kinds of comments did your company make?

18 A In one case that had to do with the technical
19 aspects of an aluminum welded cylinder, the stress factors
20 in the aluminum. And in another case it had to do with
21 the chemical analysis of a particular authorized steel.
22 In another case it had to do with the specification which
23 was proposed by the D.O.T. and which was later withdrawn.

24 Q Why was it withdrawn, in your opinion?

25 A There were some aspects that were inaccurate

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in the original proposal.

Q Did your comments point out those inaccuracies?

A Ours and those of the Compressed Gas Association.

Q How long have you been active in the compressed gas cylinder industry?

A Personally?

A About 13 years, since 1964.

Q Could you please describe the relationship between D.O.T. specifications and industry proposals for specifications?

A The D.O.T. specifications almost entirely consist of industry proposals and industry workup.

MR. SCHWARTZ: Thank you very much. That is all I have.

THE COURT: Cross-examination?

MR. PAPPER: No, your Honor.

THE COURT: Where is that intervenor?

MR. PLUMMER: No, your Honor.

THE COURT: Nobody requests cross-examination.

You may step down.

(Witness excused)

THE COURT: Next witness.

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2 ERNEST STEIGERWALT, called as a witness
3 in behalf of the plaintiff, being first duly sworn,
4 testified as follows:

5 MR. SCHWARTZ: I have two documents to offer
6 into evidence. If we may, we will simply show them to
7 counsel and see if they accept their authenticity?

8 THE COURT: Any objection to those documents?

9 MR. PAPPER: Not as to their authenticity,
10 your Honor.

11 THE COURT: Any objection from the intervenor,
12 or attempted intervenor?

13 MR. PLUMMER: May we reserve, your Honor --

14 THE COURT: I don't know what you are talking
15 about when you say "reserve." Are these forgeries or are
16 they genuine?

17 MR. PLUMMER: We have no objection to authen-
18 ticity.

19 DIRECT EXAMINATION

20 BY MR. SCHWARTZ:

21 Q Please state your name and address.

22 THE COURT: Just give us your qualifications.
23 Tell us all about yourself.

24 A I am a 1967 graduate of Lafayette College,
25 Bachelor of Arts degree in chemistry, and during college

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2 and since that time I have worked in the steel industry in
3 eastern Pennsylvania and have been involved in metallurgical
4 engineering work through that time. For the last eight
5 years I have been exclusively devoted to the manufacture
6 of high-pressure gas cylinders and I am a manager of in-
7 dustrial relations and I am responsible for all the engineer-
8 ing, design, quality control, all the customer service and
9 all the product liability litigation work we have on our
10 product.

11 Q What office do you hold in the Compressed
12 Gas Association?

13 A I am currently chairman of the cylinder
14 specifications committee.

15 Q What happens to the work of that committee?

16 A Most of the work of that committee is ulti-
17 mately submitted to the Department of Transportation for
18 petitioning for rule-making changes.

19 Q In your experience, what has the Department
20 of Transportation done with that information?

21 A In most cases outside of the normal comment
22 period, it is, in most cases taken almost verbatim and put
23 into the regulations.

24 Q Have you examined the files in docket 49CFR,
25 Section 173.3(a)(b)?

1 rmds Steigenwalt - direct

2 A Yes.

3 Q When did you do that?

4 A September 9.

5 Q What were you looking for?

6 A My purposes in examining the files was to
7 determine if it was possible to, by examining the files,
8 determine what procedure the United States Department of
9 Transportation used in approving both inspections and the
10 manufacturing facilities.

11 Q What did you find?

12 A What I found basically was that the manu-
13 facturing facilities and the inspecting agents submitted
14 detailed descriptions of their manufacturing facilities
15 and engineering facilities and the inspectors themselves
16 submitted details giving exactly how -- in some cases, how
17 they proposed to do the inspections and in other cases just
18 giving detailed background of the type of experience they
19 have had in inspecting various products throughout the world.

20 Q Based on your review, could you conclude the
21 applicants could meet D.O.T. specifications?

22 A No, I could not determine that and the main
23 reason was it was not possible to determine how D.O.T.
24 interplayed with the information submitted by the various
25 applicants.

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Steigenwalt - direct

2 Q Why do you say that?

3 A The reason I say that is because most of the
4 files that were available for my examination only contained
5 the information from the applicants involved. There was
6 some correspondence but most of it pertained to certain
7 specific things that I assumed the D.O.T. inspector saw
8 when he visited the facilities, and other correspondence
9 indicating things like traveling arrangements, and so forth,
10 for the various inspectors.

11 Q Four licenses have been granted in this case.
12 Did you observe those files?

13 A Yes, I have.

14 Q Were those files any more complete than the
15 others which you have observed?

16 A Again, we have a range of possibilities here.
17 One case, the Showa Kotsu Kogyo Company, in that case there
18 was a great deal of information submitted as to their
19 manufacturing capabilities, and Arrowhead Industries also
20 detailed how they proposed to do the various inspections.

21 One other application that I saw was the Warnock
22 Hersey group, and there was not as much information in
23 that, as well as in the Engineering Products of Canada files.

24 To go along with that, in the Engineering Products
25 of Canada file I found evidence that a cylinder had been

1 rmds Steigenwalt - direct
2 taken and destructively tested to determine whether it was
3 made in compliance with the specifications to which they
4 wished to manufacture.

5 Basically what I found was that there was no con-
6 sistent way of telling how the government evaluated the
7 manufacturers and the inspection agencies.

8 Q How did these files become available to you?

9 A Through the American Cylinder Manufacturers,
10 through the Freedom of Information Act that this information
11 became public.

12 Q Do you know anything about inspection trips
13 conducted by the Department of Transportation?

14 A There were no formal notices of these in-
15 spections, but through the industry grapevine we were able
16 to determine approximately what types and what manufacturers
17 were being inspected.

18 Q Do you know what they use as a check list
19 when they conduct these inspections?

20 MR. PAPPER: Your Honor, while I know we are
21 reserving all objections to relevancy, this is just hearsay
22 for which this witness has no qualification and it is
23 going into absolutely incredible areas of irrelevancy and
24 we feel compelled to object to it.

25 MR. SCHWARTZ: Your Honor, this witness went

1 rmsds Steigenwalt - direct
2 to the D.O.T. office and looked at its files, the files on
3 the licenses which we are talking about which were granted
4 in this case, and we believe his testimony about these files,
5 considering his background, is relevant to this case.

6 THE COURT: I will take it subject to the
7 question to be decided later on, as to whether or not it has
8 any relationship to the issue that I am to decide, which is,
9 as I understand it, whether there is a statutory require-
10 ment for the participation that is being sought.

11 Go ahead.

12 Q Are the D.O.T. specifications themselves,
13 in your opinion, an adequate measure of how a foreign manu-
14 facturer could have complied?

15 THE COURT: How can he say that?

16 THE WITNESS: Am I to answer that question?

17 THE COURT: What basis do you have to render
18 an opinion on that subject other than a personal opinion?

19 THE WITNESS: I grant it is a personal opinion,
20 but it is the result of experience using those same regula-
21 tions applied to the products we manufacture in our country
22 as well.

23 THE COURT: It seems to me you are giving
24 an opinion on the law at this point.

25 MR. PAPPER: We would add, your Honor, that

1 rmds Steigenwalt - direct
2 that applies to other statements this witness has made in
3 his testimony.

4 THE COURT: Go ahead. Next question. That
5 seems to me to be something counsel should brief and not
6 try to get a witness to tell me what the law is.

7 MR. SCHWARTZ: Your Honor, I did not ask the
8 witness what the law is, I asked him whether he thought the
9 current regulations as they are written in his opinion are
10 adequate to inform someone unfamiliar with them as to how
11 to apply them.

12 THE COURT: The objection to that is sustained.

13 Q Is improperly made compressed gas cylinders
14 of foreign origin were allowed to come into this country,
15 what possible interest could you have in preventing this
16 from occurring?

17 MR. PAPPER: Your Honor, I have to keep on
18 interjecting but I think this witness' personal interest
19 in --

R2 20 THE COURT: Well, this is a public reaction
21 to this material, and in the Concorde case they listened
22 to people in Howard Beach and I suppose I should listen to
23 this witness too.

24 MR. SCHWARTZ: Your Honor, the government has
25 challenged --

1 rmds Steigewalt - direct

2 THE COURT: Go ahead, answer the question.

3 A Would you please restate the question?

4 Q First of all, does the industry participate
5 extensively in D.O.T. regulatory activities?

6 A Yes, they do, and the reasons for those are
7 many. One of the prime reasons that we are so involved
8 as we are is for safety concerns within our own country,
9 both from the container manufacturer's standpoint and the
10 gas shipper's standpoint. There is a tremendous economic
11 loss that results in property damage, loss of life, if the
12 containers are not adequate --

13 THE COURT: Your further interest is that
14 it is good business for you to try to keep the foreign
15 stuff out, isn't that right?

16 THE WITNESS: No, that is not the case.

17 THE COURT: You mean it is good business
18 for you to get it in?

19 THE WITNESS: No, that is not the case either.

20 MR. SCHWARTZ: No further questions.

21 THE COURT: Any cross?

22 MR. PAPPER: No, your Honor.

23 MR. PLUMMER: No, your Honor.

24 THE COURT: Thank you very much. You may
25 step down.

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2 (Witness excused)

3 THE COURT: Have your witnesses now given
4 what they wanted to give?

5 MR. SCHWARTZ: They have given what has been
6 permitted to give.

7 THE COURT: As I understand, what we are
8 doing here is, and I would like to get some assistance from
9 counsel on this, we have here an order to show cause for
10 a preliminary injunction and a stay of the implementation
11 of this regulation on the ground, allegedly, that there was
12 some breakdown in the process of arriving at the regulation
13 and, furthermore, the public interest involved here mandates
14 that these mischievous devices be not brought in because
15 they are hazardous to life, limb and health.

16 We have a motion before the Court under
17 Rule 12(b)(6) to dismiss the complaint on the ground that
18 the complaint fails to indicate a claim on which relief
19 may be granted.

20 This afternoon counsel for the plaintiff
21 handed me a paper called "Amended Complaint" which has not
22 yet been filed but which I assume he wants to have con-
23 sidered in this matter.

24 Has the government seen the amended complaint?

25 MR. PAPPER: Yes, your Honor. We were handed

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2 it just before this hearing.

3 THE COURT: The filing of an amended complaint,
4 if timely, would of course derail your motion, unless it
5 is stipulated that your motion applies equally to the
6 amended complaint as it does to the other complaint.

7 MR. PAPPER: To a large extent it does, your
8 Honor. There appears to be, from my brief reading of it,
9 one additional statutory basis for the complaint which we
10 would like to have an opportunity to brief for your Honor
11 in the near future.

12 THE COURT: Is there any objection to treating
13 the government's present brief and motion as supplemented
14 hereafter as applicable to the amended complaint?

15 MR. SCHWARTZ: Your Honor, we have no objec-
16 tion. We filed the brief that set forth the basis for
17 this amended complaint about two or three weeks ago and
18 the government responded to it in its own brief. This
19 amended complaint is really just a formality to make formal
20 an issue that we have already raised.

21 THE COURT: But the complaint to which the
22 government addressed its brief and its motion was the
23 original complaint?

24 MR. SCHWARTZ: That is correct, your Honor.

25 THE COURT: Therefore they should have an

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2 opportunity now to present their objection to the amended
3 complaint and all I am asking you is if you want them to
4 do the typewriting over or whether we can apply the motion
5 and their brief as originally filed and as hereafter to be
6 supplemented to the amended complaint?

7 MR. SCHWARTZ: We will stipulate to that,
8 your Honor.

9 THE COURT: Does the intervenor have any
10 objection to that?

11 MR. PLUMMER: None, your Honor.

12 MR. COLLINS: We have no objection either,
13 your Honor.

14 THE COURT: Who is "we"?

15 MR. COLLINS: Engineering Products of Canada,
16 your Honor. We would like the opportunity to also submit
17 a supplemental memorandum if we deem that necessary.

18 THE COURT: Yes, of course, and the plaintiff
19 will be given the opportunity to supplement any papers
20 that it has in mind on this.

21 It seems to me that until the legal question
22 is gotten out of the way, namely, whether or not the
23 amended complaint states facts sufficient on which to
24 grant relief, there is no use in talking about an injunc-
25 tion. If the complaint stands, then the question of

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2 provisional relief becomes a second consideration. If the
3 complaint doesn't stand, there is no basis for provisional
4 relief.

5 Anybody dispute that proposition? Hearing
6 none, I assume that I have correctly stated it.

7 When can the government and the Engineering
8 group and the amicus curiae -- not intervenor as yet --
9 and the plaintiff submit any supplemental papers that are
10 desired here? Is one week enough time?

11 MR. PAPPER: One week is enough time for the
12 government, your Honor.

13 MR. PLUMMER: That is agreeable, your Honor.

14 MR. COLLINS: Yes, your Honor.

15 THE COURT: All right, everybody says one
16 week is enough time.

17 Let me ask you gentlemen this question:
18 I have here a red letter day, Monday, October 10, denominated
19 as the government's Columbus Day. That is allegedly a
20 federal alleged holiday. Would you gentlemen want to come
21 in and utilize that day from which I could disengage in
22 a pending trial, whether it is the one that is currently
23 going on or the criminal trial, which has superseding
24 rights to get started, but, nonetheless, no rights to be
25 heard on a federal holiday? Would you gentlemen wish to

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2 give up your federal holiday for the purposes of hearing
3 this matter?

4 MR. SCHWARTZ: We would be happy to, your
5 Honor.

6 MR. PAPPER: The government would be also,
7 your Honor.

8 THE COURT: Is there going to be any more
9 testimony presented on the application for provisional
10 relief?

11 MR. SCHWARTZ: Nothing more from us, your
12 Honor.

13 MR. COLLINS: I would like to have an oppor-
14 tunity to review all of these exhibits which have been
15 introduced and reserve the right for testimony. I can,
16 if you like, notify you before the hearing date.

17 THE COURT: Notify the other parties. How
18 about the government?

19 MR. PAPPER: We would also like to have an
20 opportunity to review the documents and, in addition, your
21 Honor, I don't think that we will want to introduce any
22 testimony --

23 THE COURT: You think it is a straight
24 question of law?

25 MR. PAPPER: Yes, your Honor.

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2 THE COURT: Which can be decided on the papers?
3 Subject to the reservation of second guess on this matter
4 to all parties, I will go on the assumption that on
5 October 10 at 10:30 a.m. we can get into a full scale con-
6 sideration of the legal questions that are involved and
7 consider those on an application for a final injunction,
8 that is, for the trial itself.

9 There doesn't seem to be any necessity for
10 testimony, really, in a case of this kind, is there?

11 MR. SCHWARTZ: We agree completely. We filed
12 a suggestion with your Honor which was served on all parties
13 in which we suggested that the hearing be consolidated
14 with the trial on merits and we agree that as long as the
15 factual issues regarding standing are not in issue in this
16 case, that means it is solely the legal question.

17 MR. PAPPER: I add that standing is obviously
18 a legal issue and, just to clarify matters, our representa-
19 tion that we will not have additional testimony will be
20 subject to your Honor's decision on our motion to strike
21 the testimony that we have just heard.

22 THE COURT: Well, it is not necessary to worry
23 about the formalities of striking it. If it is irrelevant
24 and immaterial, it will not affect the legal situation.
25 We don't have to get into that.

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2 I will set this matter for final hearing on
3 the merits for 10:30 a.m. on October 10 in this courtroom,
4 room 1306. If there are any papers in addition to the ones
5 that I already have that should be considered and are going
6 to be presented for consideration, they should be filed
7 with me by 2:00 o'clock on Friday, October 7, in my chambers,
8 to give me an opportunity over the weekend to study what
9 has been filed.

10 It will be appreciated if you file them
11 earlier so that we can consider them as fast as we come to
12 them, but the requirement is 2:00 o'clock on Friday,
13 October 7, and I take it that somebody will order the
14 minutes and furnish those by that time.

15 MR. PAPPER: The government will order, your
16 Honor.

17 MR. SCHWARTZ: Are those papers to be served
18 by Friday at 2:00 o'clock so that we may have a chance to
19 look at them before the final hearing?

20 THE COURT: I don't expect anything to be
21 filed without notice to the other side, which means you
22 should have an opportunity to see what they are filing. If
23 you want to present any replies to each other, I suppose
24 you can do that first thing Monday morning, but the papers
25 ought to be served and filed by 2:00 o'clock.

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2 MR. SCHWARTZ: Thank you very much, your Honor.

3 THE COURT: Is there anybody from Washington
4 that has to be served? Everybody is local here, aren't
5 they?

6 MR. PAPPER: Yes, your Honor.

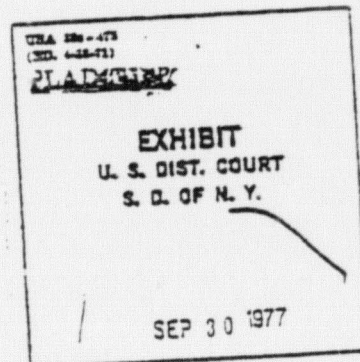
7 MR. SCHWARTZ: Your Honor, I am from Washington,
8 D.C. but Mr. Crimmins from Lord, Day & Lord will be able
9 to receive the papers.

10 MR. PLUMMER: May we ask that the intervenor
11 receive a copy?

12 THE COURT: Send a courtesy copy to the
13 attempted intervenor, and if you have anything to say, you
14 give them a courtesy copy.

15 I think that concludes the matter. Thank
16 you for your understanding and indulgence, gentlemen.

17
18
19 * * * *



PROCEEDINGS OF
CYLINDER SPECIFICATION COMMITTEE MEETING
COMPRESSED GAS ASSOCIATION, INC.

- 66 -

Held at Sheraton Harbor Inn
San Diego, California
Thursday and Friday,
December 2 & 3, 1971

PRESENT:

Steve Hunter, Chairman
T. J. Cambias (for R. Morse)
N. C. Fawley
L. Hannula
P. A. Harris
M. R. Hillegas
L. B. Hoffman
*R. Van Horn
T. P. Hunter
D. Maag
C. P. Morehouse
E. C. Nilsson
J. Parker
J. Pena
W. Piehl
G. G. Pinney
J. Rizzo
*P. Seay
R. T. Spangenberg
E. E. Stalgerwalt III
S. J. Testa
R. O. Tribolet
A. W. Zaisel
E. A. Olsen

Coyne Cylinder Company
Allied Chemical Corporation
Alcan Aluminum Corporation
The Marlson Company
T. H. Cochrane Lab
Air Products & Chemicals, Inc.
The Marlson Company
Cylinder Maintenance Division
Walter Kidde & Company
Norris Industries
Airco
Industrial Analysis
Lee Cylinder Company
National Cylinder Gas
Western Sales & Testing
National Cylinder Gas
Du Pont
Office of Hazardous Materials - DOT
Pressed Steel Tank Company
Taylor Wharton
Liquid Carbonic Corporation
Linde Division, Union Carbide Corp.
U.S. Army - Ft. Belvoir
CGA Staff

*GUEST

VOTING MEMBERS ABSENT

R. P. Berman
R. Jernberg
R. B. Schafer
A. Selan
D. Sener

Lennox Industries
Worcester Pressed Steel Company
Pennwalt Corporation
Gen. Fire Extinguisher Company
Harrisburg Steel

DOCKET 733 - PORE SIZE REQUIREMENT FOR ACETYLENE FILLERS CylSpec1DEC71

The letter prepared by the subcommittee was not forwarded to the DOT pending the resolution of questions raised by the General Tech. These points will be discussed hopefully to satisfaction of the Chairman of the General Technical Committee.

A proposal was also made to consolidate the work on Pore Size Requirement, Qualification of New Cylinders and Requalification of Used Cylinders to one subcommittee to avoid overlapping of work. See Docket 70-10 below.

DOCKET 941 - BASIC CONSIDERATION OF CYLINDER DESIGN CylSpec1DEC71

No new work was done as the subcommittee feels the work is basically complete. The subcommittee proposed to pass on the document to General Tech. There also was a proposal to make the document into a CGA pamphlet probably either patterned after Basic Considerations for Safety Relief Device Standards, under CGA Docket 941, adding updated information into the original document as needed; or in a loose leaf form similar to the B of E Tariff and on a subscription basis; or in the best possible way the CGA can handle the publication.

DOCKET 1215 - QUALITY CONTROL STANDARDS FOR DOT CYLINDERS CylSpec1DEC71

The subcommittee started on a draft which they hope will be a final draft on the premise that the DOT will consider the document for its use. The DOT representative however made it clear that if the purpose of the document will be only to clarify the intent of the specifications, the proper way to go is to incorporate the suggested clarification into the regulations by amending the wording, rather than introduce another document, the enforcement of which will add to the ambiguity of the regulations. After hearing this point of view the subcommittee voted that the docket be tabled and that the regulations be amended to incorporate the suggestions of the Quality Control Manual by the addition of more precise language in the specifications through consolidation of the specs. Docket 69-42. Refer to attached report of subcommittee meeting held 12-1-71.

DOCKET 1243 - TEN YEAR RETEST OF HIGH PRESSURE CYLINDERS CylSpec1DEC71

The subcommittee has prepared a letter to be forwarded to DOT regarding Amendment 173-33 under Docket EM-76 published in the Federal Register of October 27, 1971.

The subcommittee also is asking whether CGA members can meet with DOT representatives at a mutually acceptable date in order to review submitted data to the satisfaction of the DOT so that the 15 year limit will be removed.

December 2-3, 1977

DOCKET 67-9 (Cont'd.)

Explosives will eventually be removed from the regulations. When asked about the possibility of DOT adopting by reference an industry standard which might include some means of self-policing there were very serious questions concerning the acceptability of such a standard. As a result of this meeting, CGA staff is convinced that a proposal involving industry self-policing would prove very difficult to sell to the regulatory authorities.

The committee therefore reiterated its previous position that the initial step at this time should be to express our concern to DOT and recommend that cylinder retasters and rebuilders be identified by some identification on cylinder and that discussions be started with DOT to determine the best means of policing these operations in the future.

DOCKET 68-40 - PROPOSED LARGE CYLINDER SPECIFICATION DOT-3T CylSpec3DEC

The proposed specification was sent to DOT and reply is awaited.

DOCKET 69-42 - CONSOLIDATION OF CYLINDER SPECIFICATIONS CylSpec3DEC71

A progress report was made by the subcommittee indicating that the proposed specifications will contain portions referred to in Docket 1215. The subcommittee suggests that this first draft of the new proposal be forwarded to DOT ODM for their review so that the subcommittee may obtain guidance in polishing up the document or direction of work if the concept of the draft is not acceptable. See subcommittee report attached.

DOCKET 69-47 - 110% FILLING OF FLAMMABLE GASES CylSpec3DEC71

A special permit to fill containers with hydrogen at 110% of rated pressure was issued and the solicitors were disappointed with several requirements of the permit especially with regard to the type of safety device suggested for use. The subcommittee prepared a letter for the DOT expressing the CGA's concern on the following points:

1. Use of unbacked safety device on cylinders 63 inches or shorter is hazardous mainly because these type of cylinders are normally inside buildings and any quick release of the flammable gas is liable to cause fire and explosion.
2. The type of safety device proposed for use has had very limited use and has never been used on tubes of 22 inch diameter.



UNION CARBIDE CORPORATION

LINDE DIVISION

270 PARK AVENUE, NEW YORK, N.Y. 10017

December 15, 1971

Mr. F. A. Hunter
Coyne Cylinder Company
155 W. Bodley Avenue
Memphis, Tenn. 38109

Subject: Cylinder Specification Committee

Dear Mr. Hunter:

At the meeting in San Diego you requested that the subcommittee chairman provide you with the minutes for their subcommittee meetings so that they might be included in the general minutes for Cylinder Specification Committee. The following are my minutes:

Docket 70-10 - Qualification of New Acetylene Cylinders

The subcommittee reviewed the draft as edited from the April meeting in Fort Lauderdale and expect to have a final draft of the proposal available for sending to all members of the Cylinder Specification Committee and Acetylene Committee within approximately two months. Messrs. Hunter and Nease are to submit editorial revisions to R. G. Tribolan for final editing into the draft.

The document being drafted is expected to be published as a CGA pamphlet and thereafter referenced in the CGA regulations as the "Requirements for Qualification of New Acetylene Cylinders". This would require not only testing when the design is first manufactured but also as various significant design changes are being made. The subcommittee reviewed fire test data submitted by Linde and, generally, have agreed upon the concept of a new fire test. Complete details of this test and mechanism will be supplied to the full committee with the draft.

Docket 12-15 Quality Control Standard

After considerable discussion as to the intent of the Quality Control Manual, the subcommittee concluded that the fifth draft approved by Cylinder Specification Committee was not adequate for the purpose intended for a Quality Control Manual as referenced in the CGA response to RM-74 (foreign cylinders). A major problem to the redrafting, however, is caused by the fact there is

no definite understanding on how the document would be used and enforced. Consequently, it is very difficult to draft a proper standard.

After reviewing this subject with Mr. Seay the Specification Committee voted to shelve this docket for the time being, therefore, it should be removed from the agenda. This action was taken because Mr. Seay indicated that DOT and he would not use the document at this time nor even in the case that foreign cylinder importation is allowed. Instead they favor changing the actual DOT specifications as necessary. It therefore became evident that CGA should expend their time working on upgrading the specifications as is now being done in Docket 69-42. This was agreed upon by the committee in approving the action to discontinue and shelve Docket 12-13.

It is assumed that you have minutes from the other dockets on which I reported during the major committee meeting.

Very truly yours,

UNION CARBIDE CORPORATION
Linde Division

R. O. Trisoler
BT

Assistant Manager - Gas Distribution

cc: Mr. L. A. Olsen
Compressed Gas Association
300 Fifth Avenue
New York, N. Y. 10036



DOCKET 69-42
" 70-33

TAYLOR-WHARTON CO.

DIVISION OF HARSCO CORPORATION

WEIR KILBY
TRACKWORK PLANTS
CINCINNATI, OHIO
BIRMINGHAM, ALA.

GAS TRANSPORTS
GAS CYLINDERS
TRACKWORK
EASTON, PA. 18042

TRUCK CASTINGS
MANGANESE AND
ALLOY STEEL
HIGH BRIDGE, N. J.
ADDRESS 1801 TO
EASTON, PENNA.

December 10, 1971

To: Ed Olsen

Subject: Minutes of Subcommittee Meetings
Docket 69-42 CONSOLIDATION OF SPECIFICATIONS, 11/16-17/71
Docket 70-33 C-3 CYLINDER SERVICE LIFE, 11/29/71

DOCKET 69-42

The subcommittee met with Paul Seay and Al Roberts of the D.O.T. in Washington during June 1971. The purpose of this meeting was to review the proposed consolidation of the specifications. At this time, all specifications were basically divided into two sections: (1) a general section containing all the basic requirements for all cylinders and (2) a section containing the individual spec. which referred back to the general section.

The D.O.T. wanted the format changed in the following ways:

1. Create four basic "family" specifications seamless, welded, acetylene, and disposable.
2. Have a material specifications table located in the Appendix.
3. Eliminate or combine existing specifications.
4. Use ASTM or CGA references and eliminate duplicate wording.

Therefore, as a result of this meeting, I rewrote our original draft in light of D.O.T. comments and we used this as a nucleus for our work in Pittsburgh on November 16-17, 1971.

As a result of our Pittsburgh subcommittee meeting, a draft of the basic, general requirements for seamless cylinders was written, although several corrections are in order, and submitted to Paul Seay for comment at the San Diego meeting. The latest draft has the following format and considerations:

1. Is a basic document which will be applicable to all seamless cylinders.
2. Decided not to have an appendix for the material specifications.
3. Have greatly expanded design and manufacturing criteria, much of which was taken from Docket 1215, Quality Control and from individual company specifications for cylinders.
4. Tried to eliminate interpretations and spelled out what exactly is required.

I am at present waiting to hear comments from Paul Seay on this latest draft.

DOCKET 70-33 - 05 - Cylinder Service Life

1. Agreed to use Joe Pana's rewrite and reorganization of the pamphlet as our guide in review.
2. The rejection limit tables based on elastic expansion will be expanded to cover all popular size cylinders and tubes. These values will be pooled from the data used by the manufacturer and users.
3. Wording has been changed to make the pamphlet acceptable as a legal document suitable for inclusion in D.O.T. regulations.
4. We have covered approximately one-third of the pamphlet, and future meetings are planned.
5. Discussed the possibility of using 5/3 service pressure - 10% with permanent expansion not to exceed 10% rather than EE limits as defined in the regulations. No definite decision reached.

Ernie Steigwalt II

March 11, 1969

Secretary
Hazardous Materials Regulations Board
Department of Transportation
400 Sixth Street, S. W.
Washington, D. C. 20590

Subject: Docket HM-13
Notice No. 69-1

Gentlemen:

We have taken note of the subject docket and the petitioner's proposal to amend DOT Specification 48 so that the requirement for the seam to be on-center would be eliminated. Our comments are as follows:

One of the basic considerations in the development of this specification pertained to the fact that material strength was obtained through work hardening of the shell material, not through heat treatment. Accordingly, no heat treatment is required and the only aluminum alloy authorized, 5154, is of the "work hardening" type. Shells must be left in the as-formed state, except for the localized effect of welding, in order to provide adequate pressure strength. No doubt the reason for the center circumferential weld requirement was a concern with having equalized stresses within the two non-stress-relieved shells.

While there is no reference to backup data the proponent may have presented, we would recommend some be developed to show relative properties of unequal length shells proposed for assembly. The longer cup obviously requires additional working over the shorter one. While this could mean either a lower stressed shell, due to stress-relieving between operations, or a higher stressed one, if no stress-relieving is necessary, there will almost positively be a difference in residual strain between the two cups in a cylinder.

Specification 48 presently requires a tensile test of "two specimens cut from one cylinder or part thereof taken at random out of each lot of 200 or less" (Section 179.68-15). Further, it requires a flattening test "in one section of a cylinder taken at random out of each lot of 200 or less, after hydrostatic test" (Section 179.68-17). Our concern would be that test specimens taken from a cylinder with unequal shells could very likely not represent the cylinder portion having greatest residual strain - an area which would not meet the properties required and have a dangerously brittle condition.

Page 2

March 11, 1969

Secretary
Hazardous Materials Regulations Board
Department of Transportation
Washington, D. C.

If the proposed change is adopted, we suggest consideration be given to rewording of the sections referenced above to assure that the tests be performed in the areas which have maximum residual stresses, since the specification does not provide for removal of these stresses through a stress-relief heat treatment.

Your consideration of these comments would be appreciated.

Very truly yours,

PRESSED STEEL TANK CO., INC.

Robert F. Spengenberg,
Chief Product Engineer

hl

cc: Mr. W. M. Trevorrow
6816 Massena Court
Bethesda, Maryland 20834

BEST COPY AVAILABLE

May 19, 1969

The Secretary
Hazardous Materials Regulations Board
Department of Transportation
400 Sixth Street, S. W.
Washington, D. C. 20590

Subject: Docket No. EM-3

Dear Sir:

We have received notice of the miscellaneous amendments to the Hazardous Materials Regulations, issued April 25, 1969, which are based on the subject docket. Having examined the amendments and the significant comments listed, we would like to call your attention to one apparent inconsistency.

Comment No. 16 refers to the phosphorous limitation for Grade 3 steel in Table I, Appendix A, of Part 178, and also an allowance to cover phosphorous content of rephosphorized steels. It is stated that these valid points are taken into account by the inclusion of a basic .045% phosphorous limit and a new note 6 to cover a maximum for rephosphorized steels.

The new Table I, under Appendix A, does not include a phosphorous limit and note 6 remains as originally worded in the various specifications effected. This is apparently an oversight and we respectfully suggest that the stipulations be checked again and inserted in the regulations as intended.

Very truly yours,

PRINCE STEEL TANK CO., INC.

Robert F. Spangenberg,
Chief Product Engineer

DL

CC: Mr. F. A. Olsen
CGA, New York

RP **PRESSED STEEL TANK CO., INC.**
...IN CONTAINERS FOR GASES, LIQUIDS AND SOLIDS

ROBERT A. HIRST
Vice President Sales & Marketing

December 23, 1976

Docket Section
Office of Hazardous Materials Operations
Department of Transportation
Washington, D. C. 20590

Subject: Application for Exemption No. 7542-N

Gentlemen:

Having an interest in the subject request for exemption, we obtained from the Public Docket Room of the DOT the data relating to this request. After reviewing this information we find that certain data, referred to in the correspondence, was not available in the file. We also have a number of questions regarding the information and will relate these later in this correspondence.

As additional information is needed for a proper response to this application for exemption, we respectfully request that the deadline for comments be extended. The time of the extension should be related to our ability to obtain the missing information and answers to a number of questions that have been raised. We would appreciate your consideration of such an extension.

It appears that the basis for the petition is to permit the use of a cylinder containing a longitudinal seam (three-piece construction). In reviewing the docket, we find there is a reference to a report from Arrowhead Industrial Service (Report No. A1335) which was not available in the public file. Since this report is the basis for the consideration of an exemption, we request that this data be made available to us.

In the request for exemption there is a reference to Exemption No. 6517 which is an exemption granted for this type of three-piece construction. When permit No. 6517 was originally approved, there was substantial backup data provided in order to allow for this exemption. We, therefore, feel similar information should be made available for those wishing to make comments.

P.O. Drawer 10-J, Milwaukee, Wisconsin 53201. Phone: 414-475-0300

Office of Hazardous Materials Operations
Department of Transportation

December 23, 1976

In this request, reference was also made to proposed DOT specification 8W. Therefore, an evaluation should be made comparing this exemption request with the CGA proposed specification 8W. We find this difficult to do without having detailed information on specifications of cylinders; i.e., wall thickness relating to material used and amount of radiography performed.

We also note that in the original request there is a reference to the cylinders being imported. It would, therefore, appear that such cylinders would be subject to the regulations as provided by HM-74, specifically paragraph 173.300(a) and (b). We realize that this request for exemption was originally submitted in August of 1975 before the regulation change as a result of Docket HM-74. However, it would be our understanding that such a cylinder would now have to be manufactured by an approved foreign manufacturer as well as inspected by an approved independent inspection agency. To date, none have been authorized.

Whether under HM-74 or previous to its passing, manufacture of acetylene cylinders outside the United States requires an approved independent inspector, with duties requiring his presence in the "shell" manufacturing plant. From correspondence in the file, it is not clear whether this is intended (September 22, 1976 U. S. Cylinders Company letter).

Reference in the file is made to Bureau of Explosives tests made in June, 1976 which determine acceptability of the porous mass (Approval No. 2530). This raises several questions as follows.

1. Was the porous mass actually manufactured in the intended plant located in Alabama?
2. Was the cylinder shell used for the tests of the same design for which the petition for exemption is to be granted (three-piece construction)?
3. Details of the test and the report itself are not available in the public file. Can details of this test be made available for our review?

Office of Hazardous Materials Operations
Department of Transportation

December 23, 1976

4. Can this approval be used if the cylinder shell design intended is to be changed? In other words, if the porous mass is approved for a three-piece cylinder, would it also be applicable to two-piece or vice versa? Also, would this approval be valid if the porous mass was not manufactured in the plant described in the exemption petition?

Due to the lack of complete information and the number of questions which have arisen following a review of this file, we respectfully request additional time should be granted for comments after the complete data is available to the public and the above questions have been answered.

Yours very truly,

RAE/lkp



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OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590
September 4, 1970

File

File: 2010

Mr. Robert A. Hirst
President
Pressed Steel Tank Co., Inc.
P.O. Drawer 10-J
Milwaukee, Wisconsin 53201

Dear Mr. Hirst:

Just a note to thank you for the information you provided us regarding various methods of quenching cylinders and on the test performed by your Mr. Robert Spangenberg on valve protection caps. We appreciate the services you have given us in these two matters.

Sincerely,

Paul

Paul H. Seay
Mechanical Engineer
Office of Hazardous Materials

ORA 100-478
(ED. 4-2-71)

~~PLADYING~~

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

2

SEP 20 1977

W-2000-24-70-200-1017



DEPARTMENT OF TRANSPORTATION
MATERIALS TRANSPORTATION BUREAU
WASHINGTON, D.C. 20590

- 81 -

MAY 25 1977

Mr. T. Tohama
President
Showa Katsui Kogyo Company, Ltd.
No. 15-7, Chome, Ginza, Chuo-Ku
Tokyo, Japan

Dear Mr. Tohama:

This has reference to your application for approval of non-domestic chemical analysis and tests of cylinders under authorization of 49 CFR 173.300b, and my visit to the U.S. Cylinder plant at Citronelle, Alabama, on May 3, 4, 5, 1977.

I observed all the physical and hydrostatic testing as required by the specifications for DOT 3A2015, 3AA2263, and 27542 acetylene cylinders, except the burst test which had been performed at Belleville, New Jersey, as there was no facility to perform this test at Citronelle or Mobile, Alabama. A single hydrostatic machine was in operation; however I understand that if you get approval, you will be installing a multiple hydrostatic testing machine at Citronelle. The physical testing was performed at Southern Laboratory Inc., 1050 Government Street, P.O. Box 1867, Mobile, Alabama, 36601, and will continue to be performed there until we are advised otherwise. The above testing and equipment appeared adequate to perform the tests that were observed.

The following sample cylinders were selected at random and have been sent to the IRI Research Institute, 10 West 35th Street, Chicago, Illinois, 60616:

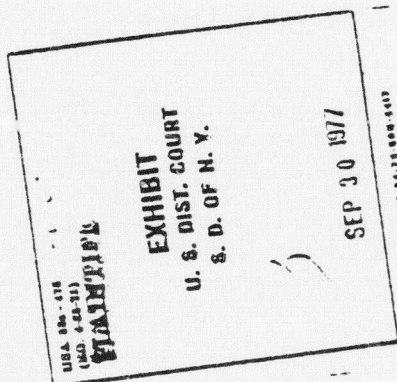
DOT 3A2015 USHPC # 1 thru 9
DOT 3AA2263 # 10 thru 18
DOT 27542 # 19 thru 24

In answer to your question as to who signs the final report, the independent inspector or interested inspector on the acetylene cylinder manufactured under 27542, the porous filling inspection will only require an interested inspector.

When the testing has been accomplished, you will be furnished a copy of the report and the cylinders will be returned to you if you desire.

Sincerely,

Original signed
Quentin H. Banks
Chief, Compliance Branch
Office of Hazardous Materials
Operations



NEW YORK
TELEPHONE:
HANOVER 2-2317
AREA CODE: 212

INTERNATIONAL REGISTER FOR THE CLASSIFICATION
OF SHIPPING AND AIRCRAFT
INSPECTION AND TESTING OF MATERIALS & MACHINERY
UNITED STATES CENTRAL OFFICE
17 BATTERY PLACE NORTH
NEW YORK, N. Y. 10004

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FOUNDED IN 1328

#1264.rb.MB

December 2, 1976

Office of Hazardous Material Operations
U. S. Department of Transportation
Washington, D. C. 20590

Attention: Mr. Alan I. Roberts, Director

Subject : Approval of Bureau Veritas as Independent
Inspection Agency as per Docket No. HM74
paragraph 173.300a

Gentlemen:

The Venezuelan Company "Tanques para Gas", Caracas, Venezuela is applying to your Department for qualification of liquefied gas cylinders that they manufacture for use in transportation of LP Gas within the United States. "Tanques para Gas" has identified Bureau Veritas as the Independent Agency that they wish to use as per paragraph 173.300 b (3) of the Docket HM 74.

Bureau Veritas hereby applies conjointly to the Department of Transport for approval as the Independent Inspection Agency for the purpose of performing cylinder inspections and verifications required by the Department of Transportation on the cylinders manufactured by "Tanques para Gas" Caracas, Venezuela.

We give you herein the informations required, taking into account the terms of your letter of July 14, 1976 in answer to our letter of June 30, 1976.

173.300a (b)

1. Bureau Veritas is a Corporation registered in Paris at 31 rue Henri Rochefort. Principal activities are: International Register for the classification of ships and Aircraft, inspection and testing of materials and machinery. The list of facilities where tests and inspections can be performed is given in the attached List of Representation.

.../...

2. The persons having a direct or indirect ownership interest in Bureau Veritas, greater than 3% are as follows:

- Mr. Edouard van den BROEK d'OSRENAN - Retired
20 Avenue de Villeneuve l'Etang 78000 VERSAILLES
FRANCE
- Mr. Lucien CHARRUAU, General Manager of Bureau Veritas
15 rue Las Cases 75007, PARIS, FRANCE
- Mrs. Helene LEFEBVRE, Retired
1 rue Leon Seche 75015 PARIS, FRANCE
- Mr. Lucien LEFEBVRE - Retired
8 avenue Kellermann 95230
SOISY-SOUS-MONTMORENCY
FRANCE
- Mr. Vincent ALBIACH - Retired
76 rue Spontini 75016 - PARIS, FRANCE

3. Permanent representation in the U.S.:

BUREAU VERITAS
17 Battery Place North
New York, New York 10004

This branch is qualified as a foreign corporation in the State of New York. A copy of the Certificate of Authority is attached.

4. The representatives of Bureau Veritas in Venezuela are:

REPRESENTACIONES MAPSA, S.A.
Agentes para Venezuela para Bureau Veritas
Calle la Joya - Esq. Av. Libertador
Edificio Unidad Tecnica del Este
Tercer piso - Oficina 7
CARACAS, VENEZUELA

- 5. The individual who will perform all the inspections is:

Mr. M. Vollmer Martinez, Julio
Birth - 19.10.1921 in OSORNO
Nationality - Chilean
Function - Appointed Surveyor in 22.05.1969
Address - Quinta Dhamarys
2a. Calle Urb. Alamo
4367 La Guaira, Venezuela

.../...

The program of inspection which is being prepared for our working relationship with "Tanques para Gas" shall include the following points:

1. Approval of drawings and calculations notes for all types of cylinders.
- 2. Control of materials, at least at random, this one depending usually on their nature.
3. Qualification of welders and of welding proceedings.
- 4. Supervision of the manufacture (at random) especially attendance to non destructive tests and measurement of wall thickness (radiographic tests, ultra-sound control, magnetoscopy...)
5. Checking of heat treatment curves.
6. Visual inspection.
- 7. Attendance to hydraulic tests, completely or at random.
8. Dimensional inspection.
9. Attendance to mechanical tests realized on test-pieces picked up on cylinders selected by the surveyor at random on the moving band of fabrication.
10. Tensile tests.
11. Bending tests.

For information we advise you that at the present time a destructive test is performed on one cylinder for a batch of 200 cylinders. The quality of steel plates and electrodes is certified by the manufacturer. The forged steel flanges are supplied by a Japanese firm, quality of which is also certified by the Inspection Department of this Manufacturer. Finally, the valves including safety valve are supplied by other Venezuelan firms and would be approved by U.L.

Official tests will be performed by a Laboratory owned by the Venezuelan Government, "Centro de Evaluaciones del Ministerio de Minas e Hidrocarburos"...

We welcome a visit to our facilities by the Director of O.R.M.

Very truly yours,

BUREAU VERITAS


M. Barruel

Chief Representative, U.S.A.

Encls.

CC; Bureau Veritas, Paris

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

- against -

77 Civ. 4358 (MP)

AMENDED
COMPLAINT

DEPARTMENT OF TRANSPORTATION,
BROCK ADAMS, as Secretary of
Transportation,
JOHN J. FEARNSIDES, as Acting Director
of the Materials Transportation
Bureau,
ALAN I. ROBERTS, as Acting Director
of the Office of Hazardous
Materials Operations, and
ENGINEERING PRODUCTS OF CANADA, LTD.,

Defendants.

The Parties

1. Plaintiff, the American Cylinder Manufacturers Committee ("ACMC"), 1055 Thomas Jefferson Street, N.W., Washington, D.C., 20007, is an unincorporated association of domestic cylinder manufacturers whose members produce approximately 90 percent of all domestically manufactured compressed gas cylinders.

2. The Department of Transportation ("the Department" or "DOT"), 400 7th Street, S.W., Washington, D.C., 20590, is an executive department organized pursuant to the Department of Transportation Act, 49 U.S.C. §1652(a).

3. Brock Adams is the Secretary of Transportation and charged with the responsibility of promulgating regulations for the safe transportation of hazardous materials under §105 of the Hazardous Materials Transportation Act, 49 U.S.C. §1804.

4. Defendant John J. Fearnside is Acting Director of the Materials Transportation Bureau ("MTB"), 2100 Second Street, S.W., Washington,

D.C., 20590, to which the Secretary of Transportation has delegated authority to promulgate such regulations. 49 C.F.R. §1.53.

5. Defendant Alan I. Roberts is Acting Director, Office of Hazardous Materials Operations ("OHMO"), 2100 Second Street, S.W., Washington, D.C., 20590. This office has been given the responsibility to consider applications filed by foreign compressed gas cylinder manufacturers and independent inspection agencies pursuant to 49 C.F.R. §173.300a and b.

6. Engineering Products of Canada, Ltd., 150 Industrial Boulevard, Boucherville, Quebec, Canada, was issued a license by defendant Roberts pursuant to 49 C.F.R. §173.300b to have ~~its~~ compressed gas cylinders chemically analyzed and tested outside the United States for the purpose of qualifying them for use in the transportation of hazardous materials within the United States. Engineering Products of Canada, Ltd.'s agent for service of process is James A. Newmann, Jack Newmann & Sons, P.O. Box 145, Goshen, New York.

Jurisdiction and Venue

7. This court has jurisdiction over this action under 28 U.S.C. §1337.

8. Venue lies properly in this court under 28 U.S.C. §1391(e)(1) because defendant Engineering Products of Canada, Ltd.'s, agent for service of process resides in the Southern District of New York.

MATTERS ALLEGED WITH RESPECT
TO ALL COUNTS

9. By regulations published on May 4, 1976, in the Federal Register, 41 Fed. Reg. 18412, DOT permitted, for the first time, foreign manufactured compressed gas cylinders transported in this country to be chemically analyzed and tested outside the United States.

10. The May 4, 1976 regulations provide that inspections and verifications required by DOT Shipping Container Specifications, 49 C.F.R.

Part 173, must be performed by an independent inspection agency approved by OHMO for low pressure cylinders manufactured outside the United States and for all high pressure cylinders. Such approval is provided for in 49 C.F.R. §173.300a.

11. The May 4, 1976 regulations provide that foreign compressed gas cylinder manufacturers may avoid the domestic testing requirement by obtaining OHMO approval to have their cylinders analyzed and tested outside the United States for the purpose of qualifying such cylinders for use in the transportation of hazardous materials within the United States. Such approval is provided for in 49 C.F.R. §173.300b.

12. In considering applications filed pursuant to 49 C.F.R. §173.300a and b, OHMO did not (1) give notice of such applications in the Federal Register, (2) permit interested persons to comment on the pending applications, or (3) explain the basis for approving such applications.

13. On August 31, 1977, OHMO issued an approval pursuant to 49 C.F.R. §173.300b to Engineering Products of Canada, Ltd.

Count I

14. An approval issued by OHMO pursuant to 49 C.F.R. §173.300a or b is a "license" within the meaning of §551(8) of the Administrative Procedure Act, which provides:

(8) 'License' includes the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.

15. Section 558 of the Administrative Procedure Act, 5 U.S.C. §558, provides, in pertinent part, as follows:

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.

16. The procedures used by OHMO in approving the application submitted by defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300b did not comply with §558 of the Administrative Procedure Act in that OHMO did not (1) give notice of the application in the Federal Register; (2) allow interested persons to comment on the application or present evidence with respect to it; and (3) explain its findings and conclusions in approving the application.

Count II

17. The procedures used by OHMO in granting a license to defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300b did not allow for any participation whatever by interested persons.

18. Beginning in July, 1976, ACMC requested, both verbally and by letters, that OHMO provide for participation by interested persons in the licensing process.

19. ACMC's request has never been answered by OHMO and it was effectively denied when the first license was issued on August 31, 1977, to Engineering Products of Canada, Ltd.

20. The record of the rulemaking proceeding reveals that major questions exist with regard to the ability of at least some manufacturers and inspection agencies properly to interpret and to apply applicable regulations.

21. Participation by interested persons in the licensing process would help assure that such questions are thoroughly examined before individual licenses are granted.

22. In light of the serious questions raised in the rulemaking record and the significant benefits of participation by interested persons, the licensing procedures used by OHMO in granting an approval to defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300b were arbitrary and capricious and therefore unlawful and invalid.

Count III

22a. An approval issued by OHMO pursuant to 49 C.F.R. §173.300a or b is an "order" within the meaning of 49 U.S.C. §1808(a), which provides:

The Secretary is further authorized, after notice and an opportunity for a hearing, to issue orders directing compliance with this chapter or regulations issued under this chapter [which includes 49 U.S.C. §1804].

22b. The procedures used by OHMO in approving the application submitted by defendant Engineering Products of Canada, Ltd., pursuant to 49 C.F.R. §173.300b did not comply with 49 U.S.C. §1808(a) in that OHMO did not (1) afford notice and (2) an opportunity for a hearing so that interested persons would have the opportunity to comment prior to the agency's approval of the application.

WHEREFORE, ACMC requests that:

23. The Court declare that the approval issued to defendant Engineering Products of Canada, Ltd. pursuant to 49 C.F.R. §173.300a and b is null and void;

24. This Court declare that all the approvals which have been issued by the defendants DOT, Adams, Fearnside, or Roberts pursuant to 49 C.F.R. §173.300a or b are null and void;

25. Defendants DOT, Adams, Fearnside, and Roberts and their official successors be enjoined from processing or issuing any further approvals pursuant to 49 C.F.R. §173.300a and b except under procedures conforming to the requirements of 5 U.S.C. §§556 and 557;

26. Such other further relief as the Court finds is just and necessary.

Respectfully submitted,

Lord, Day & Lord

by: Richard E. Schwartz

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25 Broadway
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Pro Hac Vice

September 26, 1977

WC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
AMERICAN CYLINDER MANUFACTURERS COMMITTEE, :

Plaintiff, :

- against - :

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS :
as Secretary of Transportation; JOHN J. :
FEARNSIDES as Acting Director of Materials :
Transportation Bureau; ALAN I. ROBERTS as :
Acting Director, Office of Hazardous :
Materials Operations; and ENGINEERING :
PRODUCTS OF CANADA, LTD., :

Defendants. :

-----X
New York, N. Y.
October 10, 1977 - 10:30 a.m.

B e f o r e:

HON. MILTON POLLACK,

District Judge

Appearances:

LORD, DAY & LORD, Esqs.
Attorneys for Plaintiff
BY: STEPHEN J. CRIMMINS, Esq.
RICHARD SCHWARTZ, Esq.

ROBERT B. FISKE, JR., Esq.
United States Attorney for the
Southern District of New York
BY: RICHARD PAPPER, Esq.
DOUGLAS CROCKETT, Esq.
Assistant United States Attorneys
Attorneys for defendants Department of Trans-
portation, Adams, Fearnside and Roberts

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2 Appearances (continued):

3 JOHN COLLINS, Esq.
4 Attorney for defendant Engineering Products of
Canada, Ltd.

5 HUBERT PLUMMER, Esq.
6 Attorney for intervenors
7 - - -

8 THE CLERK: American Cylinder Manufacturers
9 Committee v. Department of Transportation, et al. Counsel
10 ready?

11 MR. COLLINS: Ready.

12 MR. PAPPER: Ready.

13 MR. SCHWARTZ: We are ready.

14 THE COURT: Is there any additional evidence to
15 be offered on behalf of any party?

16 MR. PAPPER: No, your Honor.

17 MR. SCHWARTZ: Your Honor, over the weekend we
18 wrote a reply to the government's latest brief. It is very
19 short. With your permission I will hand it to you now. We
20 served it on all parties by hand.

21 THE COURT: Then I take it that the matter is
22 to be deemed fully submitted and now the findings of fact
23 and conclusions of law to be made by the Court should be
24 argued. Isn't that the next order of business?

25 MR. PALPER: Yes, your Honor.

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2 MR. SCHWARTZ: Yes.

3 THE COURT: The plaintiff may proceed.

4 MR. PAPPER: Your Honor, if I may interject at
5 this point: As you will recall, we reserved our objections
6 to the testimony that was taken on September 30. Since
7 Mr. Schwartz may, or I assume will, refer to some of that
8 testimony in his argument, perhaps this would be an
9 appropriate time for us to renew our objections.

10 THE COURT: Decision reserved. Go ahead, Mr.
11 Schwartz.

12 MR. PLUMMER: With the permission of the Court,
13 may the intervenors move up to the jury box? We are having
14 some difficulty hearing.

15 THE COURT: Yes. I will be with you in just a
16 minute, Mr. Schwartz.

17 MR. SCHWARTZ: Your Honor, if you would like to
18 read the brief before I start --

19 THE COURT: I will read it while you talk.

20 MR. SCHWARTZ: May it please the Court, my name
21 is Richard Schwartz and I am appearing today on behalf of
22 the American Cylinder Manufacturers Committee. By way of
23 introduction, I would like to say that we are satisfied the
24 way the briefs in this case present the issues, including the
25 last brief that we filed, and with your permission I will not

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2 repeat what has been said in those briefs. I will merely
3 add some additional points to fill in some of the interstices
4 in our argument.

5 One argument that I think is crucial here
6 that I would like to trace through is the argument concerning
7 the duties imposed upon by the Secretary of Transportation
8 by Section 1808(a) of 49 USC, which is the Hazardous
9 Materials Operations Act. We filed an addendum to our
10 brief on September 15, if I recall correctly, in which we
11 pointed out that this section requires DOT to hold hearings
12 when it issues orders, and we also pointed out that the
13 Administrative Procedure Act defines orders expressly to
14 include licenses.

15 In its responsive brief, first responsive brief,
16 filed on September 26, the government did not deny that
17 this action applied to the kind of action which is being
18 taken. What it said, however, was that this was merely
19 discretionary, that the Secretary was authorized to hold
20 hearings, that he didn't have to do it, nothing commanded
21 him to do it.

22 In this regard, again I think we have covered
23 this point in our briefs, I think the only reasonable
24 interpretation of that section is that he is authorized to
25 issue orders, and in fact it is discretionary as to whether

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2 or not he issues the orders, but if he does issue an order,
3 it can only be after notice and an opportunity for a public
4 hearing.

5 THE COURT: Where does it say that?

6 MR. SCHWARTZ: Section 1808(a) of 49 USC. It
7 is cited in complete in the latest brief we filed.

8 THE COURT: I have found it right here. I want
9 to turn to it and have you point out to me where it says
10 what you say.

11 MR. SCHWARTZ: All right. If you will look
12 under Section 1808.

13 THE COURT: Just a minute. Let me see if I
14 really do have it.

15 MR. SCHWARTZ: If not, I have a copy for you,
16 and it is cited in the last brief that we filed. We have
17 reproduced it verbatim. I think it is on the second page
18 of the three-page brief that I just handed your Honor.

19 THE COURT: I have read it many times, but I
20 don't have a Xerox copy of it here.

21 MR. SCHWARTZ: I can hand you mine.

22 THE COURT: All right, let me see yours. Have
23 you got an extra for yourself?

24 MR. SCHWARTZ: Yes, I do.

25 THE COURT: All right. Let us read it together.

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2 Where does it say what you say?

3 MR. SCHWARTZ: All right. What I am citing
4 consists of the second sentence, paragraph (a). It begins,
5 "The Secretary is further authorized, after notice and an
6 opportunity for a hearing, to issue orders directing
7 compliance with this chapter."

8 THE COURT: Stop there. Is an approval a
9 direction for compliance?

10 MR. SCHWARTZ: Your Honor, in this case the
11 approval is a direction for a compliance, because the
12 approval is in the nature of an enforcement order, like the
13 other kinds of enforcement orders that the Secretary issues
14 under this section of the act. The only difference is that --

15 THE COURT: You think a license is an enforcement
16 order?

17 MR. SCHWARTZ: This particular kind of license
18 is, because it conditions compliance upon --

19 THE COURT: You mean before they cross the
20 threshold they are being commanded to enforce the license?

21 MR. SCHWARTZ: No, your Honor. What I am saying
22 is that the Secretary of Transportation has determined that
23 in order for a foreign manufacturer to qualify as to ship
24 cylinders into the United States, he has to submit to certain
25 conditions. He has to qualify for this license.

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2 THE COURT: Yes.

3 MR. SCHWARTZ: Part of this license consists of
4 requirements to the appointed agent for service of process
5 in the United States, and that he submit his factory or his
6 manufacturing area to inspections, without notice, to the
7 Secretary of Transportation, in addition to whatever other
8 conditions may be put upon him.

9 One of the other conditions that has been put
10 upon him in these licenses is to have the requirements to
11 have specified markings on the cylinders before they enter
12 into the United States.

13 Ordinarily a compliance order would not be
14 issued until after a violation. That is in the ordinary
15 course of things.

16 THE COURT: Where does it say in this statute
17 that this kind of an order for compliance is issuable
18 before a violation?

19 MR. SCHWARTZ: It does not say so in the
20 statute.

21 THE COURT: It does not seem to make much sense
22 to tell someone to comply with something that he is already
23 complying with.

24 MR. SCHWARTZ: Your Honor, these foreign
25 manufacturers have never complied with these regulations

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2 before. In other words, this is a new procedure.

3 THE COURT: You mean to say that if I am licensed
4 to drive an automobile and I am a new driver and I have
5 never driven an automobile before, that the motor vehicle
6 department can tell me I am in violation and I should
7 comply?

8 MR. SCHWARTZ: Well, no. This kind of order
9 does not tell you that you are in violation at all, but it
10 functions --

11 THE COURT: Then it is not an order for
12 compliance if there is no violation.

13 MR. SCHWARTZ: Your Honor, I think it is an
14 order for compliance, and I think the way it is worded in
15 fact operates as an order for compliance.

16 In an ordinary case you would issue a com-
17 pliance order because a license--someone who manufactures
18 cylinders is giving evidence that they could not comply.
19 Therefore, you condition the right to manufacture cylinders
20 on compliance with certain other conditions, certain other
21 conditions which the Secretary thinks is necessary. In the
22 ordinary case when you have an American manufacturer you
23 would not require that until there had actually been a
24 violation. In this case you have a situation where there
25 is a foreign manufacturer, and so certain additional con-

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2 ditions must be entered into before there will be the right
3 to ship the cylinders.

4 That is why the Secretary investigates the
5 particular foreign manufacturer, in order to determine
6 whether he can qualify basically for this kind of enforce-
7 ment order.

8 I also would like to point out in regard to
9 your question a point that we raised in the brief, that the
10 way the scheme of the act is devised there are really two
11 enabling sections here for the Secretary with regard to
12 regulations to enforce hazardous materials transportation
13 laws.

14 The first section is Section 1804(a), which is
15 also cited on page 2 of our reply brief, and that empowers
16 the Secretary to issue regulations which implement, basically
17 implement Hazardous Materials Transportation Act. That is
18 an enabling section. And it seems to give plenary power to
19 the Secretary to issue regulations to govern this kind of
20 transportation and use.

21 THE COURT: There is no question but what the
22 regulations were adopted after notice and hearing, is there?

23 MR. SCHWARTZ: That is correct.

24 THE COURT: So the attack here is not on the
25 regulations per se.

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2 MR. SCHWARTZ: That is correct. The only
3 reason that I am citing the section is that there is nothing
4 in the section about enforcement. It simply empowers the
5 Secretary to issue orders.

6 THE COURT: That brings up the further question
7 that the affidavit of Alan I. Roberts, the Director of the
8 Office of Hazardous Materials Operations, and the subjoined
9 affidavits of Quentin Banks and A. Louise Mills, are not
10 controverted for the purposes of this hearing of the merits.
11 Is that right?

12 MR. SCHWARTZ: As far as I know, that's correct.
13 I have read them and I haven't seen anything in them that
14 I would contradict.

15 THE COURT: I am going on the assumption that
16 all of the evidentiary data that I am to consider, to the
17 extent that I am to consider it at all, appears in the
18 testimony of the two witnesses that you produced and these
19 three affidavits that have been supplied.

20 MR. SCHWARTZ: That is correct.

21 THE COURT: None of which have been controverted
22 as to the facts.

23 MR. SCHWARTZ: That is correct, your Honor.
24 There is no dispute as to the facts insofar as I know.

25 THE COURT: All right.

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2 MR. SCHWARTZ: In any event, I was speaking to
3 the term of the scheme. So basically what 1804(a) does --
4 and 1804(a) is the section that the Secretary relied upon --
5 what it does is authorize the Secretary to issue orders.
6 There are other sections that specifically go to the
7 enforcement of those orders.

8 We believe the only section that could
9 authorize the kind of action that is involved here is
10 section 1808(a).

11 The point we made in the reply brief that we
12 handed your Honor this morning and handed to the other
13 parties is that if this section, which is the enforcement
14 section, does not authorize the licenses which are issued
15 here, then there is no authority to issue the licenses,
16 because there is no other section for the Secretary to
17 turn to, to empower him to do what he has done.

18 I don't think it could be disputed that any
19 agency is empowered to do only what a specific statute
20 authorizes it to do. The Supreme Court has held as much in
21 the case of Stark v. Ricard, and the Administrative Procedure
22 Act, in Section 706, requires the Court to set aside agency
23 action in excess of its statutory authority.

24 So if there is no specific statute that
25 authorizes this kind of action, then it cannot be done.

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2 What we are saying, your Honor, is that the enforcement
3 section is Section 1808(a), and there is nothing in the
4 legislative history of that section which suggests that it
5 should be limited to orders in the nature of cease and
6 desist orders. In fact, the legislative history of this
7 section suggests the opposite.

8 This legislative history, your Honor, which I am
9 going to discuss, is not cited, but we looked at it over
10 the weekend and this is what we found. The House version
11 of the Hazardous Materials Transportation Act said simply
12 that the Secretary may issue orders, and then it had a
13 long list of other things that the Secretary was empowered
14 to do. The Senate version said the Secretary may issue
15 cease and desist orders, and it also included the other
16 powers that now appear in Section 1808(a).

17 In the final version, the Senate's language is
18 adopted, except that the limitation on cease and desist --
19 for cease and desist orders was taken out. It seems to me
20 that the obvious inference is that the Secretary was not
21 to be limited to cease and desist orders when it enforced
22 the regulations under Section 1804(a). It was to be given
23 broader power.

24 What we are saying today, your Honor, is that
25 if you look at Section 1808(a), under the entire scheme of

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2 the Transportation Act, which is Sections 1801 through 1812,
3 what you find is that Section 1808(a) is the section that
4 authorizes the Secretary to enforce these regulations.
5 And the legislative history of Section 1808(a) shows that
6 that power is to be very broad. There is no suggestion
7 whatever that the power had to be limited to any particular
8 kind of order.

9 The words that appear which you noted, which
10 might suggest another interpretation, are: The Secretary
11 is authorized to issue orders directing compliance with
12 this chapter or regulations issued under this chapter.
13 There are two ways you could read this. One is to say it
14 can only issue orders directing compliance. The other way
15 to read it is to say that he is authorized to issue orders
16 directing compliance with this chapter or regulations
17 issued under this chapter.

18 So it defines the scope of his authority to
19 issue orders under Section 1808(a).

20 The second point I wanted to make with respect
21 to the interpretation of Section 1808(a) was the contention
22 in the government's brief that there has been an
23 administrative interpretation which limits this section to
24 basically cease and desist orders, to orders enforcing
25 violations -- excuse me -- orders that apply to past

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2 violators of the act.

3 I have read the Federal Register notice, which
4 the government cites, and I invite the Court also to read
5 that Federal Register notice. What it does is what one
6 would expect it to do: What DOT says is that they are
7 implementing Section 1808(a) by providing procedures for
8 what amounts to cease and desist orders.

9 There is nothing in this Federal Register
10 notice to suggest that the Department of Transportation was
11 taking any kind of official position which said that cease
12 and desist orders were the only way it could enforce or
13 implement Section 1808(a).

14 THE COURT: Of course there is another answer
15 to it. That 1808(a) has nothing at all to do with the
16 subject of approvals.

17 MR. SCHWARTZ: It could be, your Honor, but --

18 THE COURT: You are putting it under that um-
19 brella, but maybe that umbrella is not the place to lodge
20 the approval of a testing operation.

21 MR. SCHWARTZ: That may be, your Honor, but if
22 that is the case, the Secretary would have to look to
23 another section to empower him to issue the approvals.

24 THE COURT: You mean, there is no overall
25 power of the Secretary to administer the Hazardous Materials

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2 Act?

3 MR. SCHWARTZ: No, there is not, your Honor.
4 There are specific sections that authorize him to do
5 specific things.

6 THE COURT: In other words, they created an
7 act and did not put anybody in charge. Is that what you
8 are saying?

9 MR. SCHWARTZ: Yes, they did, your Honor. They
10 put the Secretary of Transportation in charge and they told
11 him --

12 THE COURT: Where did they put it? What
13 language puts him in charge?

14 MR. SCHWARTZ: Section 1804.

15 THE COURT: What does it say?

16 MR. SCHWARTZ: What it says is that the
17 Secretary is empowered to issue regulations, and then it
18 defines what those regulations are to cover.

19 THE COURT: They did issue regulations, and
20 one of the regulations had to do with testing.

21 MR. SCHWARTZ: These regulations did not have
22 to do with testing, your Honor. These regulations are merely
23 procedures for the Department of Transportation to grant
24 licenses. There is no substantive testing requirements in
25 these regulations. The testing requirements appear in other

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2 regulations.

3 THE COURT: But it gives the power to adminis-
4 ter the act under Section 1804, the power to decide who may
5 approve and how approvals may be made.

6 MR. SCHWARTZ: Yes, your Honor. I think the
7 Secretary does have that power.

8 THE COURT: And isn't that the purpose
9 of the regulations that took five years to pass was?

10 MR. SCHWARTZ: That is right, your Honor. But
11 Congress specified that once the regulations are enforced
12 by specific orders, implemented by specific orders, there
13 should be notice and an opportunity for a hearing. There
14 is no loophole in the scheme of the act. In other words,
15 Section 1804(a) says that you can issue regulations after
16 notice and opportunity to comment. Section 1808(a) --

17 THE COURT: Doesn't it seem extraordinary that
18 an ordinary licensing power or privilege should invoke
19 public notice and hearing?

20 MR. SCHWARTZ: This is not an ordinary --

21 THE COURT: Is there any other example of that
22 kind of a restriction on the right to issue a license?

23 MR. SCHWARTZ: Oh, yes, there is. For example,
24 certificates of convenience and necessity issued by the
25 Federal Power Commission.

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2 THE COURT: That is different. A certificate
3 of convenience and necessity is an entirely different
4 subject.

5 MR. SCHWARTZ: It is a different subject, your
6 Honor. It is simply another instance where the statutory
7 scheme requires notice and opportunity for hearing for
8 certain kinds of licenses. In other words, most agencies
9 take the position that whether or not notice and opportunity
10 for hearing is required depends upon the enabling statute,
11 it depends upon what the statutory authority tells them.
12 But we are saying if you look through Sections 1801 through
13 1812, of the Hazardous Materials Transportation Act, every-
14 thing the Secretary is empowered to do he is empowered to do
15 only after some kind of public notice or opportunity --
16 either coupled with opportunity for comment or opportunity
17 for a hearing.

18 Section 1804(a), the regulations, says that
19 there should be notice and comment. Section 1808(a) for
20 orders simply says there shall be notice and opportunity
21 for a hearing. He has to act under one or the other.

22 In this regard we believe that the language
23 upon orders of 1808(a) covers these kinds of orders.

24 You may recall we mentioned in one of our
25 briefs, I think the first one we filed, that the

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2 Administrative Procedure Act specifically defines an order
3 to include a license. The government has argued that
4 that applies only to the Administrative Procedure Act, it
5 has nothing to do with the Hazardous Materials Transportation
6 Act. But what the APA does with respect to the word "order"
7 when it is applied to an administrative agency is make it
8 a term of art, so that when a legislator drafts legislation
9 for an agency and he uses words that are defined in the
10 Administrative Procedure Act, there is a reasonable
11 presumption that he is using them as a term of art, as the
12 Administrative Procedure Act defined them.

13 THE COURT: Of course, the Secretary did not
14 say that he was ordering anything. He merely said that he
15 was approving something.

16 MR. SCHWARTZ: Yes, he did, your Honor.

17 THE COURT: Maybe that was a prescient use of
18 semantics?

19 MR. SCHWARTZ: Maybe it was, because the word
20 "approval" is specifically in the definition of a license,
21 and the definition of a license is specifically in the
22 definition of an order. So, as these words are used in an
23 administrative context, an approval is an order. The term
24 "order" is very broad. The Administrative Procedure Act
25 divides agency action basically into rule-making and the

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2 issuance of orders. And the definition of an order
3 specifically excludes rule-making. So an order is defined
4 as something that is not rule-making. And rule-making is
5 defined as something that has general effect and general
6 applicability.

7 So that Section 1804(a) authorizes the
8 Secretary to issue rules which are regulations of general
9 applicability in effect.

10 Section 1808(a) authorizes orders, which is
11 the other kind of making of law or the other kind of rule-
12 making adjudication that an agency does.

13 So basically the two sections do give plenary
14 power to the Secretary to regulate the transportation of
15 hazardous materials; we believe that they do. What we are
16 saying is that there are no holes in between these two
17 statutes that allow the Secretary to act without giving
18 notice or an opportunity for hearing.

19 In its initial brief responding to the first
20 brief that we filed raising this issue about whether
21 Section 1808 applied, the government did not deny that
22 section 1808(a) applied to the kind of action that the
23 Secretary has done here. What the government said was that
24 this was merely discretionary, that the Secretary of
25 Transportation was not required to give notice and

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2 opportunity for a hearing.

3 In that regard, again we have covered it in
4 our brief, but I want to point out that in respect of
5 administrative interpretation, DOT has interpreted similar
6 language in the Hazardous Materials Transportation Act to
7 require a hearing. In Section 1808(a) the statute says
8 that the Secretary is further authorized, after notice and
9 opportunity for a hearing, to issue orders. The same
10 language, or very similar language, appears in Section
11 1809, which is the civil penalties section. In Section 1809
12 the statute says that any person who is determined by the
13 Secretary, after notice and an opportunity for hearing, to
14 have done certain things can be subject to certain
15 penalties.

16 In talking about that section in the Federal
17 Register notice that the government cited to you, the
18 Department of Transportation referred to that section as
19 a statutorily required opportunity for a hearing.

20 If your Honor would like, I can show you the
21 two sections I am referring to (handing). Here is the
22 language in the Hazardous Materials Transportation Act.

23 THE COURT: I have this material before me.
24 All right, I will look at your copy. It is marked up.
25 What else?

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2 MR. SCHWART : Just a few other points.

3 There remains a dispute in the briefs regarding the holding
4 in the New York X-ray case, and the government has said
5 that this applies to the withdrawal of a license. We say
6 it applies to the issuance of a license. And this is
7 material under Section 558 of the Administrative Procedure
8 Act.

9 THE COURT: I don't see how that case helps you
10 one bit. All that happened there was that the Court of
11 Appeals, by a divided court, said that they would
12 preliminarily enjoin an action because there seemed to be
13 a suggestion that there was probable cause to believe that
14 there was merit to what was being claimed. That is not a
15 ruling that after full hearing on an injunction matter and
16 a trial on the merits that the Court is going to rule in
17 the way that it was ruled for purposes of maintaining the
18 status quo. That case tells you really nothing on the
19 subject, other than some obiter dicta. They said, weighing
20 the circumstances of this man who had been in the business
21 for, what, twenty-five years, they said we would like to
22 have an evidentiary hearing on this whole affair and hold
23 everything in check.

24 The question was an interesting one. It wasn't
25 clearly erroneous. It wasn't definitely accepted that there

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2 was anything wrong with the regulation. But there might
3 be something wrong with it, and weighing the equities it was
4 best to let the thing go to full trial.

5 Judge Moore, on the other hand, said that:
6 Don't waste your time with a hearing. Let's dismiss it
7 right now.

8 That case does not prove anything, other than
9 it was equitable to keep the status quo until final hearing.

10 MR. SCHWARTZ: In that case I will not discuss
11 it further.

12 I only have two further points to make, and
13 one is with regard to standing, and I merely wanted to
14 point out that the rights that we are asserting in this
15 case are merely the right to participate in administrative
16 action. And the statutes we are invoking are statutes which
17 grant, we believe, grant us, along with the rest of the
18 public, that right to participation. So we believe we
19 fall directly within the zone of interest of those statutes.

20 Finally, there has been some talk about where
21 the public interest lies here, and I want to briefly mention
22 our view of that matter.

23 The first is that the companies we represent
24 are extremely experienced in this area, and they should be
25 very helpful in the process. The second is that the Supreme

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2 Court has recognized that whoever has an interest to engage
3 in administrative proceedings performs a useful function,
4 because whoever has the interest may be the only person in
5 the public who is willing to bring errors to the government,
6 who is willing to make the effort to bring to the attention
7 of the government any errors that may have been committed.

8 Finally, in terms of this case itself, we
9 believe that the paramount public interest here is that the
10 government obeys the law.

11 Justice Brandeis once referred to the government
12 as the omnipresent teacher. And we believe that holding
13 the government to its statutory authority is a meritorious
14 thing for anyone to do.

15 The government is very powerful. Lord Acton
16 once said that power corrupts. In a very crude aphorism,
17 public access to agency action is a check on arbitrary use
18 of power by an administrative agency. Our government has
19 been built on checks and balances, and this is merely a part
20 of that process.

21 Finally, in terms of the interest of
22 participation, there has recently been passed a government-
23 in-sunshine law, which is a Congressional statement of
24 policy, or amounts to one, that the government should be
25 opened up and should be opened up to the public.

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2 Here the Department of Transportation --

3 THE COURT: Do you really believe that?

4 MR. SCHWARTZ: The government should be opened
5 up to the public?

6 THE COURT: Yes. Or is that just one of those
7 popular shibboleths for mob rule?

8 MR. SCHWARTZ: No, I believe -- in fact,
9 personally, if you want my opinion, I believe it is true.
10 I have seen enough of the government to think that it
11 should be open to public action.

12 THE COURT: In other words, you think that the
13 whole process of licensing is one that should get into the
14 hurley-burley of adversary hearings.

15 MR. SCHWARTZ: No, I am not, your Honor. I am
16 saying that --

17 THE COURT: Where would you draw the line?

18 MR. SCHWARTZ: I am saying that the process of
19 licensing in this particular case is complicated enough so
20 that the government should not do it in the dark. It
21 should lay open the application to comments from the public.

22 THE COURT: That is what it was doing for six
23 years when it was having the rule-making procedures. Weren't
24 they for six years going into that kind of area?

25 MR. SCHWARTZ: No, they were not, your Honor.

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2 THE COURT: And didn't they come up with
3 regulations at the end of that six-year period subject to
4 the last claim that your people took in August of 1976 about
5 that subject?

6 MR. SCHWARTZ: Your Honor, those regulations
7 did not go into the merits of any particular foreign
8 manufacturer. In fact, in the preamble to those
9 regulations --

10 THE COURT: Are we discussing the merits of a
11 foreign manufacturer or are we discussing where a testing
12 station can be had?

13 MR. SCHWARTZ: Where a testing station can be
14 had to ship cylinders in the United States. It is connected
15 in the mind of DOT if nowhere else with the ability of the
16 manufacturer to comply with the regulations, and its
17 financial responsibility.

18 THE COURT: It has nothing at all to do with
19 the duty to comply. Previous to that, under the old system
20 the Canadians or whoever manufactured these things would ship
21 them into the United States and they would be subjected to
22 American testing. Now with qualified testing outside of
23 the borders of the United States the test can be done outside.
24 It is the same manufacturer, same product. The only thing
25 is to put the sticker on it. They say you can do it up there

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2 in Canada.

3 MR. SCHWARTZ: That is correct. It does say
4 that. But the point is that the reason you want to have
5 extra safeguards is because they are in Canada or they may be
6 in Thailand or they may be in Japan. And because of the
7 danger of the cylinder you want to make sure, first of all,
8 that we don't catch violations after they occur, because
9 people may have been injured after they occurred. We want
10 some assurance that safe cylinders will be shipped in the
11 first place.

12 The second point is that a foreign company is
13 less likely to be subject to the authority of an American
14 regulator. And so licenses are only given to companies that,
15 first of all, will appoint agents for service in the United
16 States and we expect give indications that they will be
17 financially responsible. Because they are dealing in a
18 hazardous commodity, and very often the law places special
19 regulations on those who do deal in hazardous commodities.

20 THE COURT: What about the regulations that
21 you have not touched on yet, Section 173.300a and .300b,
22 where the regulations clearly say that any person who
23 manufactures cylinders outside the United States may apply
24 to the Department for approval to have chemical analyses
25 and tests of those cylinders required by Part 173 performed

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2 outside the United States for the purpose of qualifying
3 them for use in the transportation of hazardous materials?

4 Why do you say that the Secretary could not
5 pass that kind of regulation?

6 MR. SCHWARTZ: We are not saying that he could
7 not.

8 THE COURT: If he could, and that is the
9 regulation, doesn't that foreclose everything you have been
10 telling me?

11 MR. SCHWARTZ: We believe it does not, your
12 Honor. We are not saying that he can't issue approvals.
13 All we are saying is that he can't issue approvals without
14 public participation, without notice and an opportunity for
15 a hearing. We are not challenging those regulations insofar
16 as they go. All we are saying is that licensing process
17 cannot be conducted without a public hearing. And neither
18 are we saying that all the foreign manufacturers that make
19 applications will be opposed by us. In fact, I think the
20 Department of Transportation can tell you that informally
21 we have indicated to them that there are many, many
22 manufacturers whose applications we would not oppose. All
23 we are saying is that there should be an opportunity for
24 some kind of public input in the process. That is the entire
25 substance of this lawsuit. We are not challenging the

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2 substance of those regulations. We are challenging only
3 the procedures by which licenses are issued.

4 THE COURT: What would you do if you got
5 notice that there was an applicant? What could you do at
6 a hearing that would have any significance?

7 MR. SCHWARTZ: Well, it would depend on what
8 the application said. Perhaps nothing. Perhaps the
9 application would be perfect and we would have nothing to say,
10 and that may indeed happen in many instances. On the other
11 hand --

12 THE COURT: Why should there be an exercise
13 in futility for your benefit?

14 MR. SCHWARTZ: Because there may be other
15 instances where we will have a lot to say. And in this
16 regard I want to refer your Honor to the testimony of Mr.
17 Spangenberg, when he pointed out the kind of input he
18 personally has given to DOT with regard to specifications
19 and with regard to the kind of activities that DOT does.
20 Both Mr. Spangenberg and Mr. Steidelwald testified about
21 the fact that the substantive regulations originate in
22 industry, they are usually industry proposals which DOT
23 adopts. The industry has particular expertise in this field
24 of regulatory activity and has exercised that expertise in
25 interaction with the agency for decades.

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THE COURT: All right. Anything else?

MR. SCHWARTZ: I have nothing more, your Honor.

THE COURT: I will hear from the government.

MR. PAPPER: May it please the Court, I am Richard Papper, an Assistant United States Attorney on behalf of the government, although out of fear of risking Lord Acton's wrath from the grave, I should perhaps disguise that fact.

I too believe that the briefs fairly, fully set forth our position, and I simply want to respond to some of the allegations made in the plaintiff's argument just now.

The first is the Byzantine complexities that Mr. Schwartz has attempted to read into Section 1808(a). The way out of that thicket is simply to read the statute. The statute applies to orders directing compliance. An order directing compliance, as we point out on page 3 of our supplemental memorandum of law, as defined in 49 C.F.R. 107.307, makes it clear that what the statute is talking about is the enforcement of regulations under the act and to prevent violations thereof.

The fact that the Administrative Procedure Act may have a definition of order does not mean that that definition can be automatically substituted for the term "order directing compliance" in Section 1808(a).

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2 Therefore, it seems quite clear that the
3 plaintiff has not found a statute, as it must, other than
4 the APA, which requires notice and an opportunity to be heard
5 before the sorts of inspection and manufacturing approvals
6 that issue here may be issued by the Department of Trans-
7 portation.

8 Without such a statute other than the APA, the
9 plaintiff's action must fail, since Section 558(c) of the
10 Administrative Procedure Act, as we have discussed fully
11 in our briefs, does not provide a right to a hearing or a
12 requirement for a hearing and for notice when no other
13 statute so requires.

14 The legislative history makes it clear, Judge
15 Moore's discussion of the Administrative Procedure Act as a
16 whole makes that clear, and there is nothing in the New York
17 Pathological case in Judge Holden's opinion, which as your
18 Honor pointed out, of course, only held the status quo.
19 There is nothing in Judge Holden's opinion for the majority
20 which contradicts that.

21 So what the plaintiff is left with is a
22 section of the Administrative Procedure Act which does not
23 require a hearing in and of itself, and it can point to nothing
24 in the Hazardous Materials Transportation Act or any other
25 statute which does require such a hearing.

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2 In addition, your Honor, I want to respond to
3 the point that Mr. Schwartz made about ACMC's standing, which
4 we have argued is completely lacking here. It is important
5 to remember what is and what is not being challenged here.
6 ACMC is not challenging Department of Transportation regula-
7 tions that are in any way directed at it or its members.
8 The challenged regulations don't withdraw any privileges
9 from the domestic cylinder manufacturers, they don't do
10 anything to them, they don't affect them directly. All they
11 do is to permit foreign manufacturers who meet the very
12 stringent requirements of the new regulations to be able to
13 sell their cylinders in the domestic market. And therefore
14 the only interest that ACMC or its members has in this action
15 is what they have referred to as loss of business.

16 As we have pointed out, government action which
17 fosters lawful competition does not grant standing to those
18 who will allegedly suffer a loss of profits because of new
19 competition in their market.

20 There is no statutory scheme that protects
21 the competitive interest that ACMC wants to retain for its
22 members, and in fact the May 4, 1976 notice in the Federal
23 Register which published the final amendment's notes, the
24 Justice Department has expressed serious concern about the
25 lack of competition in the domestic cylinder market.

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2 I would just make one final point also, your
3 Honor: that the argument that has been presented in the
4 plaintiff's briefs and in the argument today before this
5 Court boils down essentially to what is a completely un-
6 acceptable and extraordinary notion of the way the
7 administrative and regulatory process should work. What
8 ACMC is in effect saying is that Congress may have delegated
9 the responsibility of regulating transportation safety of
10 hazardous materials to the Department of Transportation,
11 but they don't care about that. The fact that Congress has
12 given this agency the expertise does not mean to ACMC
13 that the Department of Transportation can make an adequate
14 decision about which companies do or do not meet their very
15 high standards for compressed gas cylinders. What ACMC
16 is saying is that only by direct participation in each and
17 every application approval procedure by the domestic
18 cylinder manufacturers and the domestic cylinder manufacturers
19 trade association can the Department of Transportation make
20 an expert and judicious and objective decision as to which
21 foreign manufacturers should come into the American market.

22 This is a fairly extraordinary proposition and
23 one that finds no basis either in law or in logic.

24 For these reasons and for the reasons which we
25 have gone into at length in our briefs, we submit that the

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2 complaint should be dismissed.

3 THE COURT: What do you say to Mr. Schwartz's
4 argument that if Section 1808(a) is not an appropriate
5 statute to be considered, there is no statutory authority
6 for approvals?

7 MR. PAPPER: No, your Honor. The statutory
8 authority would be in Section 1804, which permits the
9 Secretary to issue orders of this sort, regulations of this
10 sort, and to carry on licensing procedures.

11 THE COURT: Regulations.

12 MR. PAPPER: I think it is not --

13 THE COURT: What do you say about his argument
14 that Sections 1801 to 1812 indicate that everything that
15 the Secretary can do requires notice and hearing?

16 MR. PAPPER: Your Honor, that is taking the
17 administrative process one step beyond what it should be
18 taken to. There are two points to be borne in mind here,
19 two stages of this. One is the issuance of the regulations,
20 173.300a and b. Those are authorized by the statute. I
21 think even Mr. Schwartz has no quarrel with that.

22 The next question is what the Secretary may do
23 to carry out those regulations. The Secretary obviously
24 cannot simply stop at the regulations and make them self-
25 enforcing that by some miracle it will be decided without

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2 anybody's action which foreign manufacturer can and cannot
3 be approved. Therefore, the procedures for the individual
4 approvals are simply carrying out the mandates of the
5 regulations which everybody agrees were duly promulgated.

6 What Mr. Schwartz seems to be suggesting is that
7 it is necessary for each minute detail of an agency's
8 execution of its regulations to carry on rule-making pro-
9 ceedings all the way through. That obviously is not the
10 case.

11 THE COURT: Is there anything that the party
12 which attempted to intervene here would like to add as
13 amicus-curiae? I may say that I will endorse the application
14 for intervention as follows:

15 "The motion to intervene is denied. However,
16 the applicants may participate herein as amicus curiae and
17 submit a brief or argument if so advised."

18 MR. PLUMMER: Your Honor, we believe that the
19 matters before the Court have been covered in the briefs and
20 argument, and we have nothing further to add.

21 MR. COLLINS: Your Honor, for the record I am
22 John Collins. I represent Engineering Products of Canada,
23 one of the defendants in the action. We concur in the
24 positions advanced by the government for the reasons stated
25 by the government.

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2 THE COURT: Having had an opportunity to study
3 the legal questions submitted here and to consider the
4 factual presentation so far as that has been disclosed both
5 by the two witnesses who testified at the preliminary hearing
6 and the affidavits that have been submitted on behalf of the
7 government, which are conceded to be factual, on which the
8 Court may rely, the decision after trial is as follows:

9 The plaintiff seeks to enjoin the effectiveness
10 of approvals that would permit the holders thereof to
11 transport compressed gas cylinders in the United States that
12 have not been tested in the United States. The Department
13 of Transportation (DOT), which is charged with the governance
14 of transportation of hazardous materials in commerce in
15 the United States, has pursuant to regulations which it has
16 prescribed, issued approvals to foreign manufacturers to
17 have such cylinders tested abroad, destined for use in the
18 United States. DOT did not notify or consult the plaintiff
19 before issuing such approvals.

20 The American Cylinder Manufacturers Committee,
21 plaintiff herein, is a trade association of domestic
22 compressed gas cylinder manufacturers that has heretofore
23 participated as a friend of the governmental agency in all
24 phases of its regulatory activity, including rule-making,
25 licensing proceedings, industry suggestions on construction

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2 specifications, safety matters, and others.

3 The defendants are the Secretary of DOT and
4 departmental personnel thereof and a Canadian manufacturer,
5 Engineering Products of Canada, Ltd. (EPC), whose application
6 was approved by the agency to have its cylinders chemically
7 tested and analyzed outside of the United States for
8 qualification to be transported as hazardous material in
9 the United States.

10 The central issue to be determined is whether
11 DOT was obligated to give public notice to the plaintiff
12 and others and to conduct a hearing before issuing such
13 approvals as EPC and others have obtained in pursuance of
14 Section 173.300b of the agency's regulations. The government,
15 in addition to denying such an obligation, challenges
16 plaintiff's standing to raise such an issue or to bring this
17 suit.

18 The parties have agreed that the hearing of
19 the plaintiff's application for a preliminary injunction may
20 be consolidated with trial on the merits, and the Court so
21 ordered. Federal Rule of Civil Procedure 65(a)(2). Juris-
22 diction of this suit which seeks declaratory relief is found
23 in 28 U.S.C. section 1337.

24 I

25 The following facts are not disputed. The

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2 function of the Office of Hazardous Materials Operations
3 (OHMO) is to prescribe regulations governing the transporta-
4 tion of hazardous materials in commerce in the United States
5 and to enforce those regulations insofar as they concern
6 shippers of hazardous materials and manufacturers of
7 hazardous materials containers. Other related enforcement
8 functions are performed by separate operating administrations
9 within the Department, such as the Bureau of Motor Carrier
10 Safety of the Federal Highway Administration. The OHMO
11 functions include responsibility for prescribing,
12 administering, and enforcing regulations governing the
13 manufacture and transportation in commerce in the United
14 States of compressed gas cylinders.

15 On May 4, 1976, the Materials Transportation
16 Bureau published in the Federal Register, 41 F.R. 18412,
17 amendments to 49 C.F.R., parts 173 and 178, concerning
18 foreign-made compressed gas cylinders. Those amendments
19 were based on a rule-making proceeding that was commenced
20 by a Federal Register publication of January 19, 1971
21 (36 F.R.838). Since its formation in July 1971, the
22 plaintiff has participated very extensively in those
23 proceedings and provided comments to the public docket on
24 almost every aspect of the proposed amendments. The plaintiff
25 did not at any time during the rule-making comment on a

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2 perceived need for public notice, opportunity for comment,
3 or public hearings for the benefit of domestic cylinder
4 manufacturers with regard to each approval application
5 submitted, although such matters were within the scope of
6 the rule-making.

7 On June 3, 1976, the plaintiff petitioned the
8 Materials Transportation Bureau for reconsideration of the
9 amendments. That petition did not raise any question of
10 notice, comment, and hearings on each approval application.
11 These matters were first raised by the plaintiff in a letter
12 to the Materials Transportation Bureau, dated July 28, 1976.
13 DOT took no action on the petition for reconsideration.

14 Under the DOT's gas cylinder regulations, all
15 cylinders used in domestic commerce must have been inspected,
16 tested and chemically analyzed in accordance with the
17 Department's cylinder specifications. Inspection generally
18 must be performed during manufacture involving examination
19 of various components and surfaces of the cylinders. Tests
20 involve physical stressing of cylinders and tests on the
21 physical properties of the metals in completed cylinders.
22 Chemical analysis is required to determine the composition
23 of the metals in the cylinder.

24 The cylinders described in the Department's
25 specifications fall into two categories: high and low

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2 pressure, one distinction between the two categories
3 being the kind and degree of inspection and testing required.
4 Requirements applicable to high pressure cylinders have
5 historically been somewhat more stringent than those
6 applicable to low pressure cylinders. In particular, high
7 pressure cylinders for quite some time have been required
8 to be inspected by persons not employed by the cylinder
9 manufacturer, while inspection of low pressure cylinders
10 by employees of the manufacturer was permitted.

11 The amendments to the regulations did not
12 affect the requirement that all DOT specification cylinders
13 be inspected, tested and chemically analyzed to qualify
14 them for use in commerce in the United States. Under the
15 old rules, all tests and analyses had to be performed in the
16 United States while inspection could be performed anywhere.
17 For high pressure cylinders, the old rules required a "dis-
18 interested" inspector approved by a trade association known
19 as the Bureau of Explosives Association of American Railroads,
20 under a delegation from DOT, and between the years 1923 and
21 1967, from the Interstate Commerce Commission, to perform
22 inspections and also to verify or confirm the results of
23 tests and analyses. For low pressure cylinders, the old
24 rules allowed employees of the cylinder manufacturer to
25 perform inspections and verify tests and analyses. This was

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2 by the so-called interested inspectors. The old rules
3 imposed no restriction in either case on who actually
4 performed tests and analyses, so long as they were performed
5 within the United States.

6 The recent amendments now require foreign
7 manufacturers of low pressure cylinders as well as domestic
8 and foreign manufacturers of high pressure cylinders to use
9 independent inspection agencies approved directly by the
10 Department rather than through the Bureau of Explosives.
11 In the event a foreign manufacturer wishes to conduct
12 tests and analyses outside the United States, that
13 manufacturer in addition is himself required to obtain the
14 Department's approval. Plus, the amendments require at
15 least one departmental approval of an inspection agency,
16 and usually two approvals, inspection agency and manufacturer,
17 before any DOT specification cylinder may be manufactured
18 outside the United States. Approvals are conditioned upon
19 unannounced access by departmental personnel to the
20 manufacturing and testing site, such access not being
21 assured under the old rules.

22 Through the approvals required by the recent
23 amendments, the Department's control over the manufacturer
24 of DOT specification cylinders is greatly augmented.
25 Previously only high pressure cylinder manufacturers used

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disinterested inspectors who were approved by the Bureau of Explosives. Now independent inspectors are required for all foreign manufacturers, as well as domestic high pressure manufacturers, and those inspectors must be approved directly by the Department.

A foreign manufacturer who conducts tests and analyses outside the United States, in addition to using an approved inspector, must himself be approved by the Department. Even if he avoids submitting himself to the Department's approval examination by conducting tests and analyses within the United States, he still cannot manufacture cylinders without using an independent inspection agency approved by the Department, which approval will involve an examination of his manufacturing site by the Department.

The recent amendments appear to have significantly reduced barriers to trade by enabling foreign cylinder manufacturers to secure the services of independent inspection agencies approved for foreign inspection and by providing a means whereby tests and analyses of gas cylinders may be performed outside of the United States.

II

The plaintiff contends that the procedures employed to issue the questioned approvals to foreign compressed gas cylinder manufacturers violate the alleged

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2 notice and hearing requirements of the Administrative
3 Procedure Act (APA) 5 USC section 558(c), the statute
4 49 USC section 1808(a), and are arbitrary and capricious
5 since they do not provide for notice in the Federal Register
6 or public participation in the grant of the approvals, and
7 an opportunity to be heard on whether DOT should issue
8 approvals under its regulations promulgated pursuant to
9 49 USC section 1804.

10 In substance the plaintiff contends that any
11 "order" of the Secretary requires public notice and
12 opportunity for a hearing, and that the approvals, being
13 licensing, are orders. 5 USC section 551(6). The parties
14 agree that some statute or regulation must ground a right
15 to a hearing. They disagree, however, on the question whether
16 either 5 USC section 558(c) (part of the APA) or 49 USC
17 section 1808(a) (part of the Hazardous Material Transporta-
18 tion Act) requires such a hearing.

19 III

20 It is highly doubtful whether plaintiff possesses
21 the requisite interest intended by Congress so as to be
22 permitted to seek judicial review of the agency action in
23 licensing strangers to the plaintiff. Sierra Club v. Morton,
24 405 U.S. 727, 733 (1972). It is difficult to perceive that
25 plaintiff is entitled to be shielded from the results of

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2 competition from abroad by blocking entry of foreign-made
3 goods offered in lawful competition. Nothing in the
4 relevant statute shows a legislative purpose to foster
5 such a competitive barrier or to preclude such competition.
6 There is no constitutional protection against lawful
7 competition. Law Motor Freight v. Civil Aeronautics Board,
8 364 F.2d 139, 144 (1st Cir. 1966).

9 The government's challenge to the plaintiff's
10 standing to seek the declaratory judgment prayed for seems
11 well taken.

12 Assuming, however, that requisite standing of
13 the plaintiff to sue exists, it is nonetheless not entitled
14 to the relief sought.

15 1. The APA, section 553(c), provides no right
16 to a public hearing on an application to DOT for approval of
17 a foreign test of the cylinders to qualify them for
18 transportation in this country. The House Report accompany-
19 ing the enactment of this statute expressly cautions that
20 "it does not provide for a hearing where other statutes do
21 not do so." H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946),
22 reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. 233, 274-75

23 The APA has been construed accordingly in a
24 case raising the very point here involved. Chemical Leaman
25 Tank Lines v. United States, 368 F.Supp. 925, at 936

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(D.Del.1973) (Three Judge Court). See Lincoln Transit Co. v. United States, 256 F.Supp.990, 993 (S.D.N.Y.1966); Sesselman v. Smith, 432 F.2d 75 (3rd Cir.1970).

The plaintiff relies to some extent on Pathological X-Ray Laboratories v. Immigration and Naturalization Service, 523 F.2d 79 (1976), which is distinguishable. That case held only that a regulation which permits an agency to withdraw or refuse a license to the holder or eligible party without notice and hearing is suspect for purposes of a preliminary injunction. APA section 558(c) mandates expressly that notice and opportunity to be heard be given in connection with "the withdrawal, suspension, revocation or annulment of a license." No such obligation appears in the statute for the grant of the approval issued by DOT.

Thus, the right to an opportunity to be heard in respect to the approvals given herein must be found outside the APA. The only statute pointed to by plaintiff as requiring a public hearing for the approval of a license here involved is 49 USC section 1803(a). That deals with an "order directing compliance" with the Act; plainly a due process provision of no aid here to the plaintiff. An order authorizing testing outside of the United States is something other than an order directing compliance. A

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2 compliance order pursuant to 49 USC section 1303(a) is
3 directed at preventing violations of DOT regulations. For
4 the nature of compliance orders, see generally 49 C.F.R.
5 section 107.307. That regulation makes clear that a
6 compliance order is to be associated with a violation
7 context. An application for inspection or manufacturing
8 approval, and DOT's decision to grant or withhold approval,
9 can in no way be characterized as a "violation" which
10 triggers a compliance order.

11 Volunteered participation in agency function
12 by a trade association is a privilege which does not ripen
13 into a right to intervene and be heard in the absence of a
14 grant of status by Congress or agency regulations. The
15 fitness of a prospective licensee is a matter of agency
16 determination so far as concerns a stranger to the applica-
17 tion unless there is a statutory or regulatory requirement
18 otherwise.

19 No proof was offered to sustain the claim for
20 relief on the ground that the agency was arbitrary or
21 capricious to the plaintiff or in adopting its regulations
22 pertaining to its licensing procedure.

23 The claims fail to evince facts on which relief
24 may be granted.

25 The foregoing shall constitute the Court's

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2 findings of fact and conclusions in accordance with
3 Fed. R. Civ. R. 52(a).

4 The complaint is dismissed.

5 So ordered.

6 I return herewith Exhibit 1 and Exhibit 2 to
7 the plaintiff for custody thereof by the plaintiff in
8 accordance with the rules.

9 The papers on this application are herewith
10 endorsed "Complaint dismissed in accordance with decision
11 of October 10, 1977. So ordered."

12 I believe that completes the matter, gentlemen.

13 MR. PLUMMER: Your Honor, in granting the right
14 of U. S. Cylinders to appear amicus, could we ask that that
15 right extend to the receipt by U. S. Cylinders of any further
16 notices or applications that may be accorded any of the
17 parties in the case?

18 THE COURT: I am sure that as a courtesy you
19 will be accorded those privileges, but that courtesy does
20 not ripen into a right.

21 MR. PLUMMER: I will accept the courtesy. Thank
22 you, your Honor.

23
24
25

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within entitled action,
clock of this Court.

United States District Court
SOUTHERN DISTRICT OF NEW YORK
AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,
Plaintiff,

United States Attorney
Attorney for

Attorney for

DEPARTMENT OF TRANSPORTATION,
et al.,
Defendants.

NOTICE OF MOTION

77 Civ. 4358 (ME)

ROBERT H. FISKE, JR.

United States Attorney
for U.S.A.

791-1974
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by admitted.

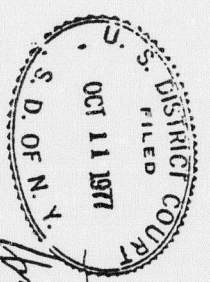
New York

Attorney for

United States Attorney
Attorney for

Attorney for

77 Civ. 4358 (ME)



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SEP 26 1977

LORD, DAY & LORD

ATTORNEYS FOR

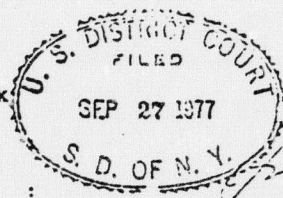
*Complaint Reviewed
in accordance with
decision of Oct 10, 1977
So Ordered
Judson Woodcock
Oct 10, 1977*

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MEMO. ENDORSED-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

v.

NOTICE OF MOTION

DEPARTMENT OF TRANSPORTATION;
BROCK ADAMS as Secretary of
Transportation;
JOHN J. FEARNSIDES as Acting
Director; Materials Transportation
Bureau; ALAN I. ROBERTS as
Acting Director, Office of
Hazardous Materials Operations; and
ENGINEERING PRODUCTS OF CANADA LTD.,

77 Civ. 4358 (MP)

Defendants.

S I R S :

PLEASE TAKE NOTICE that upon the complaint and the defendants' memorandum of law filed herein, and upon all prior proceedings had herein, defendants Department of Transportation, Brock Adams, John J. Fearnside and Alan I. Roberts will move this Court, at Room 1306, before the Honorable Milton Pollack, at the United States Courthouse, Foley Square, New York, New York on the 30th day of September 1977 at 2:00 P.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the complaint and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York

September 26, 1977

Yours, etc.,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Defendants
Department of Transportation,
Adams, Fearnside and Roberts

TO:

LORD, DAY & LORD
25 Broadway
New York, New York 10004

By:

RICHARD N. PAPPER
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, N.Y. 10007
Tel No. 791-1974

77 Civ. 4358 (HP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

-against-

DEPARTMENT OF TRANSPORTATION,
et al.,

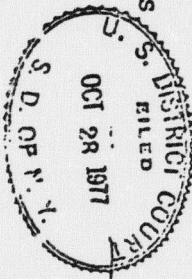
Defendants.

NOTICE OF MOTION

LORD, DAY & LORD,
ATTORNEYS FOR
Plaintiff

25 BROADWAY
NEW YORK, N.Y. 10004

AREA CODE 212-344-6480

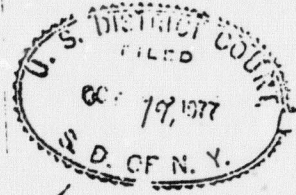


77 Civ 4358 (HP)

Motion for stay pending appeal
Motion denied
10/18/77
Be Ordered *Muelson* *Beaver*
hus D

M. J. [unclear]
77-3246

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



----- x
AMERICAN CYLINDER MANUFACTURERS
COMMITTEE, :

Plaintiff, :

-against- :

77 Civ. 4358 (MP)

DEPARTMENT OF TRANSPORTATION, BROCK
ADAMS, as Secretary of Transportation, :
JOHN FLARNSIDES, as Acting Director of :
the Materials Transportation Bureau, :
ALAN ROBERTS, as Acting Director, Office :
of Hazardous Materials Operations, and :
ENGINEERING PRODUCTS OF CANADA, LTD., :

NOTICE OF MOTION

Defendants. :
----- x

S I R S :

PLEASE TAKE NOTICE that upon the appended affidavits of Richard E. Schwartz and Stephen J. Crimmins, upon the order dismissing the complaint herein, entered on October 11, 1977, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court on October 28, 1977, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, before the Honorable Milton Pollack, U.S.D.J., in Room 2102, United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 62(c) of the Federal Rules of Civil Procedure (1) staying the effectiveness of the approvals which have been issued with respect to the inspection and testing of compressed gas cylinders outside the United States under 49 C.F.R. § 173.300(a) and (b), and (2) enjoining the issuance of additional such approvals while the appeal in this action is pending, except under procedures conforming to

By *Stephen J. Crimmins*

the requirements of 5 U.S.C. §§ 556 and 557 and 49 U.S.C. § 1808(a), together with such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
October 18, 1977

Yours, etc.,

LORD, DAY & LORD

By Stephen J. Crimmins
Of Counsel
Attorneys for Plaintiff
25 Broadway
New York, New York 10004
(212) 344-8480

COLLIER, SHANNON, RILL, EDWARDS
& SCOTT
Attorneys for Plaintiff
1055 Thomas Jefferson Street, N.W.
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(202) 337-6000

TO: ROBERT B. FISKE, JR.
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Southern District of New York
Richard N. Papper, Esq. (Of Counsel)
Attorneys for Defendants
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Adams, Fearnside and Roberts
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New York, New York 10007
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ROGERS HOGE & HILLS
Attorneys for U.S. Cylinders, Inc. and
U.S. High Pressure Cylinders, Inc.
90 Park Avenue
New York, New York 10016
(212) 953-9200

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CYLINDER MANUFACTURERS
COMMITTEE,

Plaintiff,

v.

DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

77 Civ. 4358 (MP)

AFFIDAVIT IN SUPPORT
OF MOTION FOR INJUNCTION
PENDING APPEAL

District of Columbia) ss.

RICHARD E. SCHWARTZ, being duly sworn, deposes and says:

1. I am an attorney for the plaintiff American Cylinder Manufacturers Committee (ACMC) in the above-captioned action, a member of the bar of the District of Columbia and have been admitted pro hac vice to appear before this Court. I am associated with the Washington law firm of Collier, Shannon, Rill, Edwards & Scott. I make this affidavit in support of ACMC's motion for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

2. In this action ACMC seeks a declaration that certain "approvals" to inspect and test compressed gas cylinders outside the United States under 49 C.F.R. §173.300 a and b are invalid and also seeks an injunction against the issuance of additional such approvals except after public notice and the opportunity for a hearing. ACMC contends that public notice and the opportunity for a hearing on any such proposed approval is required by the Hazardous Materials Transportation Act, 49 U.S.C. §1808(a), the Administrative Procedure Act, 5 U.S.C. §558(c), and that refusal to give public notice and the opportunity for a hearing was arbitrary and capricious.

3. This action was argued before the Honorable Milton Pollack on October 10, 1977. At the conclusion of the hearing, Judge Pollack dismissed ACMC's complaint.

4. ACMC intends to appeal to the United States Court of Appeals for the Second Circuit from Judge Pollack's order dismissing the complaint.

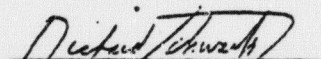
5. I am informed and believe that the Department of Transportation has issued and will issue additional approvals pursuant to 49 C.F.R. §173.700 a and b.

6. If ACMC ultimately prevails in this action, the shipment of compressed gas cylinders under the authority of the issued approvals will have unlawfully endangered the public safety in the interim. If additional approvals are issued and then declared invalid, the resulting inconvenience to the recipients of the approvals, to the intended purchasers of the cylinders, and to the government, will have been compounded.

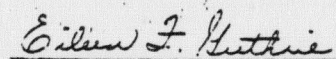
7. An injunction to preserve the status quo while the appeal is pending will avoid the foregoing dangers to the public safety, complications caused by the invalidation of numerous approvals, and disruption of the cylinder market.

8. ACMC intends to request an expedited appeal, and to unilaterally expedite its appeal in every way, so the prejudice to defendants from the requested injunction will be minimal.

9. For the foregoing reasons, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, ACMC respectfully requests this Court to stay the effectiveness of the approvals which have been issued and enjoin the issuance of additional approvals while the appeal in this action is pending.


RICHARD E. SCHWARTZ

Subscribed and sworn to before me
this 14th day of October, 1977.


NOTARY PUBLIC

My commission expires Feb. 14, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CYLINDER MANUFACTURERS :
COMMITTEE, :

Plaintiff, :

77 Civ. 4358 (MP)

-against-

DEPARTMENT OF TRANSPORTATION, et al., :

Defendants. :

SUPPLEMENTAL AFFIDAVIT
IN SUPPORT OF MOTION
FOR INJUNCTION PENDING
APPEAL

----- x
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEPHEN J. CRIMMINS, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and an associate of the firm of Lord, Day & Lord, attorneys for plaintiff in the above entitled cause. I make this affidavit in support of plaintiff's motion for an injunction pending appeal, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

2. No prior application for this injunction pending appeal has been made.

Stephen J. Crimmins
STEPHEN J. CRIMMINS

Sworn to before me this
18th day of October, 1977.

Lorraine Genovese
Notary Public

Notary Public
State of New York
Commission Expires 12/31/79

DEPARTMENT OF TRANSPORTATION
MATERIALS TRANSPORTATION BUREAU
WASHINGTON, D.C. 20590

AUG 31 1977

Mr. Michel Milot
Director General
Engineering Products of Canada Limited
110 Industrial Boulevard
Boucherville, Quebec, Canada

Dear Mr. Milot:

This is in regard to your original application dated July 16, 1976, and subsequent letters of March 4, 1977, May 3, 1977, June 17, 1977, and your Quality Control Manual hand delivered on July 27, 1977, for approval to perform the chemical analysis and tests outside the United States as authorized by 49 CFR 173.300b.

In accordance with 49 CFR 173.300b, Engineering Products of Canada Limited is hereby approved, effective upon receipt of this letter, to have the chemical analysis and tests of DOT 4BW cylinders required by section 178.61 performed at its plant at Boucherville, Quebec, Canada, under the independent inspection and verification of an agency approved for that purpose under section 173.300a.

SPECIAL CONDITIONS

- (1) The symbol EP-CANADA must be steel stamped on all DOT specification cylinders which Engineering Products manufactures.
- (2) Engineering Products may only mark to DOT specification those cylinders it manufactures in accordance with this approval and applicable DOT requirements.
- (3) In addition to cylinder test reports submitted to persons stated in the applicable DOT specification, a copy of each such report must be submitted to this office.
- (4) If production has been terminated for more than six months, this office must be notified prior to resumption.

This approval does not relieve Engineering Products or its employees of any obligations imposed by applicable regulations. Violation of applicable regulations or this approval, or failure to insure adequate independent inspection and verification, may be grounds for approval termination. Variance from the terms of this approval may be authorized only by the issuing authority. In the event any information submitted in the application for this approval changes, this office must be notified within 20 days, except that 20 days' advance notice is required for any substantial change in the manufacturing process or procedures.

Any correspondence concerning this approval may be addressed to: Director, Office of Hazardous Materials Operations, 2100 2nd Street, S.W., Washington, D.C. 20590. A copy of an approval issued under 49 CFR 173.300a to Warnock Hersey Professional Services Ltd. is enclosed for your information.

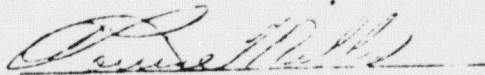
Sincerely,



Alan I. Roberts
Director
Office of Hazardous
Materials Operations

Enclosure

A true copy of the original.


Certifying Officer

CERTIFICATE OF SERVICE BY MAIL

I, George M. Bernier, an agent of the law printing firm of Byron S. Adams, Inc. of Washington, D.C., being of mature age and familiar with the requirements of service of briefs and other similar legal documents, do hereby certify that on this 18th day of November, 1977, one copy of a document entitled

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE,

Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS,
as Secretary of Transportation, JOHN J. FEARNSIDES,
as Acting Director, Materials Transportation Bureau,
ALAN I. ROBERTS, As Acting Director, Office of
Hazardous Materials Operations, and ENGINEERING
PRODUCTS OF CANADA, LTD.,

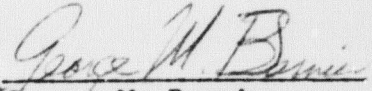
Defendants-Appellees.

JOINT APPENDIX

was served on the following persons, who have been represented to me as opposing counsel in said action, by first class mail, with proper postage applied and deposited in a mail box of the United States Postal Service:

Richard N. Papper, Esq.
Assistant United States Attorney
U.S. Department of Justice
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

John Collins, Esquire
Reboul, MacMurray, Hewitt, Maynard & Kristol
75 Rockefeller Plaza
New York, New York


George M. Bernier
1213 K Street, N.W.
Washington, D.C. 20005
202/347-8203